DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1173
Title: Marvin M. Brandt Revocable Trust, et al., Petitioners
v.
United States
Docketed: March 26, 2013
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (09-8047)
Decision Date: September 11, 2012
Rehearing Denied: December 26, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 22 2013	Petition for a writ of certiorari filed. (Response due April 25, 2013)
Apr 17 2013	Order extending time to file response to petition to and including May 28, 2013.
Apr 23 2013	Brief amicus curiae of Pacific Legal Foundation filed.
Apr 25 2013	Brief amici curiae of Cato Institute, et al. filed.
Apr 25 2013	Brief amicus curiae of Owners' Counsel of America filed.
May 28 2013	Order further extending time to file response to petition to and including June 27, 2013.
Jun 18 2013	Order further extending time to file response to petition to and including August 1, 2013.
Jul 24 2013	Order further extending time to file response to petition to and including September 5, 2013.
Sep 5 2013	Brief of respondent United States filed.
Sep 6 2013	Letter of September 6, 2013, from counsel for petitioners received.
Sep 11 2013	DISTRIBUTED for Conference of September 30, 2013.
Oct 1 2013	Petition GRANTED.
Oct 21 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Nov 4 2013	SET FOR ARGUMENT ON Tuesday, January 14, 2014.
Nov 15 2013	Joint appendix filed. (Statement of costs filed)
Nov 15 2013	Brief of petitioners Marvin M. Brandt Revocable Trust, et al. filed.
Nov 19 2013	Record from the U.S.C.A. 10th Circuit is electronicand located on PACER. One additional record from the U.S.C.A. 10 Circuit (1 envelope).
Nov 19 2013	Brief amicus curiae of Northwest Legal Foundation filed. (Distributed)
Nov 20 2013	Motion for leave to file amici brief filed by Owners' Counsel of America, et al.

Nov 21 2013	CIRCULATED.
Nov 22 2013	Brief amici curiae of Cato Institute, et al. filed. (Distributed)
Nov 22 2013	Brief amicus curiae of National Association of Reversionary Property Owners filed. (Distributed)
Nov 22 2013	Brief amicus curiae of Pacific Legal Foundation and Center for Constitutional Jurisprudence filed. (Distributed)
Nov 22 2013	Brief amicus curiae of New England Legal Foundation filed. (Distributed)
Dec 9 2013	Motion for leave to file amici brief filed by Owners' Counsel of America, et al. GRANTED.
Dec 16 2013	Brief of respondent United States filed. (Distributed)
Dec 23 2013	Brief amici curiae of Rails To Trails Conservancy, et al., filed. (Distributed)
Dec 23 2013	Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed)
Dec 23 2013	Brief amici curiae of States of New Mexico, et al. filed. (Distributed)
Jan 7 2014	Reply of petitioners Marvin M. Brandt Revocable Trust, et al. filed. (Distributed)
Jan 14 2014	Argued. For petitioners: Steven J. Lechner, Lakewood, Colo. For respondent: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Mar 10 2014	Judgment REVERSED and case REMANDED. Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ., joined. Sotomayor, J., filed a dissenting opinion.

PETITION FOR WRIT OF CERTIORARI

No. 12-1173

In The Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST
AND MARVIN M. BRANDT, TRUSTEE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the General Railroad Right-of-Way Act of 1875 ("1875 Act"), under which thousands of miles of rights-of-way exist across the United States. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that 1875 Act rights-of-way are easements and not limited fees with an implied reversionary interest. Based upon the 1875 Act and this Court's decisions, the Federal and Seventh Circuits have concluded that the United States did not retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would continue a circuit split. The question presented is:

Did the United States retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee (collectively "Brandts"). The Brandts were defendants in the U.S. District Court for the District of Wyoming and appellants before the U.S. Court of Appeals for the Tenth Circuit. The Brandts are not corporate entities.

Respondent is the United States of America. The United States initiated this action against the Brandts and others, and was the appellee below.

Wyoming and Colorado Railroad Company ("WYCO") is a Utah corporation and was a defendant below. WYCO did not participate in the Tenth Circuit proceedings.

The other defendants were: Board of County Commissioners, Albany County, Wyoming; DuWayne Keeney; Elizabeth Keeney; Susan Torres; Juan Torres; Bunn Family Trust, Debra R. Hinkel, Trustee; Roger L. Morgan; Daniel K. McNierney; Susan McNierney; Ralph L. Lockhart; Duane King; Patricia King; Marilyn Flint; Marjorie Secrest; Gary Williams; June Williams; Glenna Louise Marrs Trust, Glenna Marrs and Rondal Wayne, Trustees; Kenneth R. Lankford II; Kenneth R. Lankford, Sr.; Patrick R. Rinker; Patricia A. Rinker Flanigin; David Yeutter; Marilyn Yeutter; Snowy Range Properties, LLC; Michael Palmer; Sally Palmer; Ray L. Waits; Breazeale Revocable Trust,

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT – Continued

Vernon H. and Norma J. Breazeale, Trustees; Eugene L. Budnick; Donald Graff; Wanda Graff; Lawrence R. Otterstein; Ginny L. Otterstein; Ronald B. Yeutter; Helen D. Yeutter; Patrick R. Rinker; Lynda L. Rinker; Edmund L. Gruber; Donna Ellen Gruber; Robert S. Pearce; Dorothy M. Pearce; David M. Pearce; Steven M. Pearce; Kathlynn A. Lambert; Steven P. Taffe; Janis A. Taffe; Billy M. Ratliff; and Tobin L. Ratliff. None of these defendants participated in the Tenth Circuit proceedings.

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PETITION FOR WRIT OF CERTIORARI

Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee (the "Brandts"), respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit, dated September 11, 2012, was not selected for publication in the Federal Reporter and is reproduced at Appendix ("App.") 1-9. The opinion of the U.S. District Court for the District of Wyoming was not selected for publication in the Federal Supplement and is reproduced at App. 10-56.

STATEMENT OF JURISDICTION

On March 2 and 3, 2009, the district court entered judgment in favor of the United States and against the Brandts. App. 57-59. On April 29, 2009, the Brandts timely filed a Notice of Appeal. On September 11, 2012, the Tenth Circuit issued a per curiam decision affirming the district court's decision. App. 1-9. On October 24, 2012, the Brandts filed a timely petition for rehearing en banc and/or panel rehearing. The petition was denied on December 26, 2012. App. 67-68. This Petition for Writ of Certiorari is filed within ninety days of that date. This

Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The General Railroad Right-of-Way Act of 1875 ("1875 Act"), 18 Stat. 482-83 (1875), is codified at 43 U.S.C. §§ 934-939, and is reproduced at App. 69-71.

The Act of March 8, 1922, 42 Stat. 414-143 (1922), is codified at 43 U.S.C. § 912, and is reproduced at App. 72-73.

Relevant portions of Section 3 of the National Trails System Improvements Act of 1988, Pub. L. No. 100-470, § 3, 102 Stat. 2281 (1988), are codified at 16 U.S.C. § 1248(c) and (d), and are reproduced at App. 74.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND.

A. Railroad Land Grants.

During the 1800s, the United States promoted, as national policy, the development and settlement of the public domain in the western United States. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668, 670-77 (1979). In furtherance of this policy, between 1850 and 1871, Congress sought to encourage the private building of railroads through the immense and undeveloped public domain by granting railroads a

right-of-way ("ROW") and alternating sections of lands along the ROW. *E.g.*, Pacific Railroad Act, 12 Stat. 489-98 (1862); Amended Pacific Railroad Act, 13 Stat. 356-65 (1864); Northern Pacific Railroad Act, 13 Stat. 365-72 (1864). This Court has interpreted these pre-1871 railroad acts as granting a limited fee in the railroad ROW with an implied condition of reverter. *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) ("In effect the [ROW] grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.").

B. The General Railroad Right-Of-Way Act Of 1875.

Railroad land grants eventually met with public disapproval, and after 1871, Congress changed its policy in favor of homesteaders. Paul W. Gates, *History of Public Land Law Development*, 379-81, 396-99, 454-57 (1968). Although unwilling to make outright grants of land to railroads, Congress did not wish to stymie the development of a nationwide railroad system. To avoid this problem, beginning in 1872, Congress passed a number of special acts granting to designated railroads only ROWs through the public lands.[1] These acts generally provided for the disposal

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[1] On March 11, 1872, the House of Representatives passed the following Resolution:

> Resolved, that in the judgment of this House the policy of granting subsidies in public lands to railroads

(Continued on following page)

of lands over which the railroad ROW crossed "subject to" the railroad ROW. *E.g.*, Act of April 12, 1872, 17 Stat. 52 (1872) ("all lands over which the said line of road shall pass shall be sold, located, or disposed of by the United States, subject to such right of way so located as aforesaid"); *see* Cong. Globe, 42nd Cong., 2nd Sess., 2136-37 (1872). Finally, in 1875, in order to avoid the need for special legislation for each new railroad, Congress passed the General Railroad Right-of-Way Act of 1875 ("1875 Act"), 18 Stat. 482-83 (1875), codified at 43 U.S.C. §§ 934-939, repealed as to the issuance of ROWs by the Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976).

Of particular importance is Section 4 of the 1875 Act, which provides: "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." App. 70-71. Based upon this statutory language and the history surrounding that passage of the 1875 Act, the Department of the Interior ("DOI") consistently interpreted the 1875 Act as granting an easement rather than a fee. *E.g.*, Circular,

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> and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the *public lands should be held for the purpose of securing homesteads to actual settlers*, and for educational purposes, as may be provided by law.

Cong. Globe, 42nd Cong., 2nd Sess. 1585 (1872) (emphasis added).

Right of Way – Railroads – Act of March 3, 1875, 12 L.D. 423, 428 (1888) ("The act of March 3, 1875 is not in the nature of a grant of lands; it does not convey an estate in fee. . . . It is a right of use only, the title still remaining in the United States."); *Fremont, Elkhorn and Missouri Valley Ry. Co.*, 19 L.D. 588, 590 (1894) ("That the right of way granted by the [1875 Act] is a mere easement cannot be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way.'"). Congress also recognized that the 1875 Act granted only an easement. *E.g.*, Act of June 26, 1906, 34 Stat. 482 (1906) (expressly characterizing 1875 Act ROWs as "easements"); Act of February 25, 1909, 35 Stat. 647 (1909), codified at 43 U.S.C. § 940 (same).

C. This Court's Decision In *Stringham*.

That 1875 Act ROWs were easements for railroad purposes was well recognized by the courts and administrative agencies until 1915, when this Court decided *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44 (1915). *Stringham* involved a private dispute brought by a railroad claiming an 1875 Act ROW against the purchaser of surface rights from a mining claimant. *Id.* at 45-46. The railroad prevailed and title to the ROW over the mining claim was quieted in its favor. *Id.* at 46. The railroad ultimately brought a writ of error to this Court asserting that it should have been adjudged the fee simple owner of the strip of land through the mining claim. *Id.* at 46-47.

Although this Court affirmed, relying on cases interpreting pre-1871 railroad acts, it stated, arguably in dictum:

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, *but a limited fee, made on an implied condition of reverter* in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

Id. at 48 (emphasis added).[2]

D. Congress Responds To *Stringham*.

The "limited fee" language in *Stringham* naturally raised concerns in Congress as to what to do with the strips of land upon abandonment by a railroad. H.R. Rep. No. 217, 67th Cong., 1st Sess., quoted in S. Rep. No. 388, 67th Cong., 2nd Sess., at 1-2 (emphasis added). Because these strips of land would have "little or no value to the government[,]" *id.*, and Congress had originally intended to convey the underlying land to homesteaders, Congress passed the Act of March 8, 1922, 42 Stat. 414-15 (1922), codified at 43 U.S.C. § 912, to transfer those strips of lands to

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[2] This misstatement was likely made because *Stringham* involved only private parties and this Court did not have the benefit of a brief from the United States.

whom the adjacent lands had been patented. App. 72-73. This statute provides, in relevant part:

> *Whenever public lands of the United States have been or may be granted to any railroad company* for use as a right of way for its railroad . . . , and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall . . . be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, . . . *Provided further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.*

Id. (all emphasis added).

E. This Court Rejects *Stringham* And Reaffirms That 1875 Act ROWs Are Easements.

In *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 270 (1942), the United States sought to enjoin a railroad from removing the oil and gas from

underneath an 1875 Act ROW. Based upon Congress' shift in policy in 1871, the text of the 1875 Act, contemporary constructions of the 1875 Act by the DOI, and similar constructions by Congress as reflected in subsequent legislation, the United States argued that 1875 Act ROWs are merely easements for railroad purposes that conveyed no right to the minerals underlying the ROW. Brief for the United States, *Great Northern Ry. Co. v. United States*, No. 149, 1942 WL 54245, *9-35.

This Court emphatically agreed with the United States' persuasive arguments and ruled that 1875 Act ROWs are easements. *Great Northern*, 315 U.S. at 271 ("The [1875] Act . . . clearly grants only an easement, and not a fee."). In reaching this conclusion, this Court noted that Section 4, which allowed for the subsequent patenting of the lands "subject to" a ROW, was "especially persuasive" because such actions would be "wholly inconsistent with the grant of a fee." *Id.* In fact, this Court stressed that "'[a]pter words to indicate the intent to convey an easement would be difficult to find[.]'" *Id.* (quoting *MacDonald v. United States*, 119 F.2d 821, 825 (9th Cir. 1941)). Accordingly, this Court also expressly rejected the "limited fee" language in *Stringham*:

> The conclusion [in *Stringham*] that the railroad was the owner of a 'limited fee' was based on cases arising under the land-grant acts passed prior to 1871 and it does not appear that Congress' change of policy after

> 1871 was brought to the Court's attention. . . . We therefore do not regard it as controlling. Statements in [other cases] that the 1875 Act conveyed a limited fee are dicta based on the *Stringham* case and entitled to no more weight than the statements in that case.

Id. at 279 (footnotes and internal citations omitted).

F. The National Trails System Improvements Act Of 1988.

In 1983, Congress amended the National Trails System Act to transform abandoned railroad ROWs into recreational trails. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42, codified at 16 U.S.C. §§ 1241-1251. Although laudable, that goal has often clashed with private property interests. *See generally*, *Preseault v. I.C.C.*, 494 U.S. 1 (1990) ("*Preseault I*"); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc) ("*Preseault II*"). Later, Congress passed the National Trails System Improvements Act of 1988, Pub. L. No. 100-470, 102 Stat. 2281 (1988). Section 3 of that Act provides, in relevant part:

> Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in [43 U.S.C. § 912], shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such

> right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

16 U.S.C. § 1248(c); App. 74. The Secretary of Agriculture, in opposing this provision, noted it "assumes that the United States has some remaining residual interest in certain railway rights-of-way which could be converted to recreation trail uses. That may or may not be the case." S. Rep. No. 408, 100th Cong., 2nd Sess. at 10, *reprinted in*, 1988 U.S.C.C.A.N. 2607, 2614. The Secretary further explained, "[i]n our experience and from review of selected railroad grants affecting National Forests, it appears that the United States has residual property interests in few, if any, rights-of-way over private land within National Forest boundaries.").

II. PROCEEDINGS BELOW.

Around 1908, the Laramie, Hahn's Peak and Pacific Railway Company was granted an 1875 Act ROW. App. 13. The grant was for a two-hundred-foot-wide ROW approximately 66 miles in length, that ran from Laramie, Wyoming south to the Wyoming-Colorado border. *See id.*

On February 18, 1976, the United States patented approximately 80 acres of land to Melvin M. and Lulu M. Brandt, parents of Marvin M. Brandt. App. 76-78. The patented land, which now comprises Fox Park, Wyoming, is surrounded by the Medicine

Bow-Routt National Forest, and is essentially bisected by the above-described 1875 Act ROW. App. 11-13. Although the Patent expressly reserves certain ROWs and road easements, it does not reserve any interest in the 1875 Act ROW. App. 76-78. Instead, the Patent simply provides that the patented land is:

> SUBJECT TO those rights for railroad purposes as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns . . . under the Act of March 3, 1875, 43 U.S.C. 934-939.

App. 78.

In November 1987, Wyoming and Colorado Railroad Company, Inc. ("WYCO"), acquired the 1875 Act ROW. App. 13. On May 15, 1996, WYCO filed a Notice of Intent to Abandon Rail Service with the Surface Transportation Board ("STB") seeking to abandon the 1875 Act ROW including the portion that traversed the Brandts' property. *Id.* On December 31, 2003, the STB approved abandonment of the 1875 Act ROW, and, on January 15, 2004, WYCO notified the STB that it had consummated abandonment. App. 13-14.

On July 14, 2006, the United States filed suit in the U.S. District Court for the District of Wyoming seeking a judicial decree of abandonment, under 43 U.S.C. § 912, for approximately 28 miles of the 1875 Act ROW that was within the National Forest. App. 10-11. The United States also sought to quiet title against the Brandts and approximately 50 other private landowners over whose lands that 28-mile

segment of the 1875 Act ROW crossed.[3] *See* App. 11-12. The United States' claim was based primarily on the Tenth Circuit's decision in *Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028 (10th Cir. 1994), which had ruled that the United States retained an implied reversionary interest in an 1875 Act ROW and, upon a judicial decree of abandonment, that implied reversionary interest was transferred to the underlying fee owner pursuant to 43 U.S.C. § 912. App. 15-18. The United States' claim was also based upon 16 U.S.C. § 1248(c), which, according to the United States, modified 43 U.S.C. § 912, so the United States retained the implied reversionary interest in 1875 Act ROWs upon a judicial decree of abandonment. App. 18-21.

The Brandts answered and filed a counterclaim seeking to quiet title to the abandoned 1875 Act ROW.[4] App. 12. The Brandts argued, *inter alia*, that,

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[3] The United States also sued WYCO, which stipulated to the entry of judgment that it had abandoned the relevant segment of the 1875 Act ROW. App. 60-61. The United States either settled with, or obtained default judgments against, all the landowners except the Brandts.

[4] The Brandts also sought to quiet title to two road easements that burden their property. App. 31-56. That claim is not at issue here. The Brandts also counterclaimed for just compensation if the district court were to hold that the United States acquired some kind of property interest in the abandoned 1875 Act ROW under 16 U.S.C. § 1248(c). This counterclaim was dismissed without prejudice. App. 62-66. After final judgment by the district court and before filing their Tenth Circuit appeal, the Brandts filed a takings claim in the Court of Federal Claims,

(Continued on following page)

under this Court's decision in *Great Northern*, the 1875 Act ROW was an easement. App. 21-24. As such, 43 U.S.C. § 912 and 16 U.S.C. § 1248(c) did not apply. *Id.* Instead, because neither the 1875 Act nor the Patent expressly reserved any interest in the ROW, the Brandts acquired fee title to their patented land "subject to" the railroad easement. *Id.* And, upon abandonment by WYCO, the Brandts' property became unburdened by the 1875 Act ROW. *Id.* In support of that argument, the Brandts relied primarily on the Federal Circuit's decision in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) and the Court of Federal Claims decision in *Beres v. United States*, 64 Fed. Cl. 403 (2005) ("*Beres I*"), both of which held that the United States did not retain implied reversionary interests in 1875 Act ROWs and when 1875 Act ROWs are abandoned the underlying fee is unburdened by the easement.

On April 8, 2008, the district court ruled that, under the Tenth Circuit's decision in *Marshall*, the United States had an implied reversionary interest in

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alleging that the district court's actions in vesting title in favor of the United States and expanding the scope of the 1875 Act ROW to include a recreational trail effectuated a taking. That case was initially stayed pending the outcome of this case. After this Court's ruling in *United States v. Tohono O'odham Nation*, ___ U.S. ___, 131 S. Ct. 1723 (2011), the stay was lifted and the case was dismissed. *Brandt v. United States*, 102 Fed. Cl. 72 (2011), *appeal pending*, No. 2012-2050 (Fed. Cir.). If the Brandts are successful here, that would necessarily render their takings case moot.

the 1875 Act ROW under 43 U.S.C. § 912. App. 26-30. Then, through application of 16 U.S.C. § 1248(c), the district court declared that the implied reversionary interest became vested in the United States. *Id.* Although the district court acknowledged "the split in the circuits" it was compelled to "follow the law promulgated by the Tenth Circuit. . . ." App. 27.

Almost one year later, the district court entered judgment in favor of the United States and against the Brandts. App. 57-59. That judgment provides that: (i) the 1875 Act ROW, where it traverses the Brandts' property, has been abandoned by WYCO for all purposes, including 16 U.S.C. § 1248(c) and 43 U.S.C. § 912; (ii) the United States retained a reversionary interest in the ROW; (iii) as a result of the abandonment by WYCO, title to the ROW is "hereby vested and quieted in the United States"; and (iv) fee title to the Brandts' property remains with the Brandts subject to the rights of the United States in the ROW. *Id.* Although not pleaded, argued, or proven by the United States, that judgment also provides "[t]hat the interest quieted and vested in the United States includes the right to construct and operate a *recreational trail* on the railroad right-of-way[.]" App. 59 (emphasis added).

On April 29, 2009, the Brandts timely appealed. Over three years later, on September 11, 2012, the Tenth Circuit issued a per curiam decision affirming the district court's judgment. App. 1-9. Based upon *Marshall*, the Tenth Circuit ruled that the United States had an implied reversionary interest in the

1875 Act ROW and, upon the judicial decree of abandonment, the United States retained that implied reversionary interest through operation of 43 U.S.C. § 912 and 16 U.S.C. § 1248(c). App. 3-6. In so doing, the Tenth Circuit acknowledged the circuit split, which now includes the Seventh Circuit:

> Though we recognize that the Seventh Circuit, the Federal Circuit and the Court of Federal Claims have concluded that the United States did not retain any reversionary interest in these railroad rights-of-way, we are bound by our precedent. Thus, the district court correctly held that the interest in the abandoned railroad right-of-way belongs to the United States.

App. 5-6 (internal citations omitted).

On October 24, 2012, the Brandts filed a petition for rehearing en banc and/or panel rehearing in an effort to try to resolve the circuit split. That petition was denied on December 26, 2012, prompting this Petition for Writ of Certiorari. App. 67-68.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the Tenth Circuit's decision conflicts with this Court's precedent in two important respects. First, the Tenth Circuit's decision conflicts with this Court's decision in *Great Northern*, wherein this Court, *at the urging of the United States*, held that 1875 Act ROWs were

easements and not limited fees with an implied condition of reverter. It is axiomatic that when the United States grants an easement across its lands it does not retain a reversionary interest in the easement, but merely retains the underlying fee burdened by the easement. When the underlying fee is subsequently patented into private ownership without a reservation, the patentee receives full fee title burdened by the easement. Thus, the Tenth Circuit's ruling that the United States retained an implied reversionary interest in the 1875 Act ROW cannot be reconciled with this Court's ruling in *Great Northern*.

Second, the Tenth Circuit's decision is inconsistent with this Court's ruling in *Leo Sheep* that a patent conveys all right, title, and interest of the United States, except those interests *expressly reserved* in the granting statute or the patent itself. Neither the 1875 Act, nor the Patent, expressly reserved a reversionary interest in the 1875 Act ROW. Thus, when the United States issued the Patent to the Brandts' predecessors "subject to" the ROW, the United States conveyed the underlying fee burdened by the easement and retained no right, title, or interest in the 1875 Act ROW. Therefore, the Tenth Circuit's ruling that the United States retained an implied reversionary interest in the 1875 Act ROW conflicts with this Court's ruling in *Leo Sheep*.

This Court's review is also necessary because the Tenth Circuit acknowledged that its decision conflicts with decisions of the Federal Circuit and the Seventh

Circuit. There is also uncertainty in the state courts regarding whether the United States retained an implied reversionary interest in 1875 Act ROWs. The split between the circuits and the uncertainty in the state courts justifies this Court's review.

Finally, this Court's review is necessary because the Tenth Circuit's decision upsets the settled expectations of potentially thousands of landowners who trace their title to patents that were issued "subject to" 1875 Act ROWs. If the Tenth Circuit's decision is allowed to stand, those landowners' only recourse would be to seek just compensation, with the concomitant burden on the taxpayers. Even if available, just compensation is cold comfort for the disruption and inconvenience of having a public recreational trail on one's property. Because Congress did not intend for this result when it passed the 1875 Act and authorized the patenting of land "subject to" 1875 Act ROWs, this Court's review is imperative.

I. THE TENTH CIRCUIT'S RULING THAT THE UNITED STATES RETAINED AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS CONFLICTS WITH THIS COURT'S RULING IN *GREAT NORTHERN*.

In *Great Northern*, this Court emphatically ruled that 1875 Act ROWs were easements. 315 U.S. at 277. Fifteen years later, this Court reaffirmed that ruling. *United States v. Union Pacific R. Co.*, 353 U.S. 112, 119 (1957) ("*Union Pacific*") (In *Great Northern*

"we noted that a great shift in congressional policy occurred in 1871: that after that period only an easement for railroad purposes was granted. . . .").[5] Even the Tenth Circuit has recognized this Court's ruling in *Great Northern* that 1875 Act ROWs were easements. *Chicago & N. W. Ry. Co. v. Continental Oil Co.*, 253 F.2d 468, 470-71 (10th Cir. 1958) ("[T]he appellants acknowledge, as indeed they must, the decisional force of [*Great Northern*] to the effect that the interest acquired by the railroad under the 1875 Act was merely an easement. . . ."); *Wyoming v. Udall*, 379 F.2d 635, 638 (10th Cir. 1967); *Wyoming v. Andrus*, 602 F.2d 1379, 1382 (10th Cir. 1979). More importantly, the DOI regulation in effect when the United States issued the Brandts' Patent confirmed that 1875 Act ROWs were easements: "[a] railroad company to which a[n] [1875 Act] right-of-way is granted does not secure a full and complete title to the land on which the right-of-way is located. It obtains only the *right to*

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[5] *Union Pacific* involved the 1862 Pacific Railroad Act. 353 U.S. at 113. Although this Court ruled that the railroad did not own the minerals underneath the ROW (*id.* at 114-17) and thereby, perhaps, lessened pre-1871 railroad ROWs, this Court did not alter the ruling in *Great Northern* that 1875 Act ROWs are easements. *See* Solicitor's Opinion M-37025, *Partial Withdrawal of M-36964 – Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*, 6 (Nov. 4, 2011), *available at* http://www.doi.gov/solicitor/opinions/M-37025.pdf (last visited Mar. 14, 2013) ("After the *Union Pacific* decision, *Great Northern*'s distinction between pre-1871 and 1875 Act ROWs remains relevant to determining what rights a railroad received. . .").

use the land for the purposes for which it was granted and for no other purpose. . . ." 43 C.F.R. § 2842.1(a) (1976), reproduced at App. 75 (emphasis added).[6]

It is axiomatic that when a landowner, such as the United States, grants an easement across its lands it does not retain a reversionary interest in the easement, but merely retains the underlying fee burdened by the easement.[7] *Preseault II*, 100 F.3d at 1533 (When a fee owner conveys an easement across its land the fee owner retains "a present estate in fee simple, subject to the burden of the easement.").

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[6] This regulation was originally published in 1909, *Right-of-Way Railroads*, 37 L.D. 787, 788 (1909) and was later codified as 43 C.F.R. § 243.2 (1938). In 1970, it was recodified as 43 C.F.R. § 2842.1(a). 35 Fed. Reg. 9,502, 9,649 (June 13, 1970). Although this regulation was ultimately rescinded after passage of FLPMA, *see* 45 Fed. Reg. 44,518 (July 1, 1980), it had the force and effect of law when the Brandts' Patent was issued. *United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as [a] regulation is extant it has the force of law.").

[7] At common law, a reversionary interest in a non-freehold estate, such as an easement, could not exist. *Preseault*, 100 F.3d at 1533; *see Restatement (First) of Property* § 154, comment f (1936). These common law principles are important because "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Merchants' Nat. Bank*, 101 U.S. 557, 565 (1879). Thus, "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotation omitted). There is no evidence that Congress sought to abrogate the common law definition of easement in passing the 1875 Act.

When the easement is abandoned, the underlying fee becomes unburdened. *Id.* at 1545 (citing *Restatement (First) of Property* § 504 (1944)); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) ("[A]s a matter of traditional property law terminology, a termination of the easements would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden."); *Nat'l Wildlife Fed'n v. ICC*, 850 F.2d 694, 703 n.13 (D.C. Cir. 1988) ("Because an easement is a servitude, rather than an estate in land, it is not strictly accurate to speak of an easement 'reverting'; rather, such interests 'lapse' or are 'extinguished.'").

Thus, the Tenth Circuit's ruling that the United States somehow retained an implied reversionary interest could be sustained only if the 1875 Act ROW were a limited fee – a concept this Court expressly rejected in *Great Northern*. Moreover, the United States has recently again embraced this Court's ruling in *Great Northern* that 1875 Act ROWs are easements. *See Geneva Rock Products v. United States*, 107 Fed. Cl. 166, 170 (2012) (class action in which the United States stipulated that an 1875 Act ROW was an "easement"); Solicitor's Opinion M-37025, *supra*, at 2-9 (recognizing the ruling in *Great Northern* that 1875 Act ROWs are easements and rejecting an 1989 Solicitor's Opinion that had characterized them as an interest "'tantamount'" to a fee.); App. 82 (same). Therefore, this Court should grant review to ensure

consistency with *Great Northern*, especially considering the important property interests at stake and that the United States has now disavowed the concept upon which the Tenth Circuit's ruling was necessarily premised.

II. THE TENTH CIRCUIT'S RULING THAT THE UNITED STATES RETAINED AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING THE SANCTITY OF PATENTS AND THIS COURT'S RULING IN *LEO SHEEP*.

"A patent is the highest evidence of title, and is conclusive as against the Government. . . ." *United States v. Stone*, 69 U.S. 525, 535 (1864). In addition, when a patent is issued, all right, title, and interest passes from the United States, except only those interests expressly reserved in the granting statute or the patent itself. *See Moore v. Robbins*, 96 U.S. 530, 533 (1877) (When a "patent issued under the seal of the United States . . . is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed."); *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 331 (1924) ("[W]hen a patent issues in accordance with governing statutes, all title and control of the land passes from the United States").

For example, in *Leo Sheep*, this Court expressly rejected the idea that the United States could retain property interests not expressly reserved in the land grant statute or patent. In that case, the Tenth Circuit ruled that the United States impliedly reserved an easement for access across lands patented under the Pacific Railroad Acts. *Leo Sheep*, 440 U.S. at 678. As that ruling affected 150 million acres of land in the western United States, this Court granted certiorari. *Id.* at 678, 688. Because neither the Pacific Railroad Acts, nor the patents, expressly reserved an easement for access, this Court ruled that it would not endeavor to "divin[e] some 'implicit' congressional intent" to reserve an easement for access. *Id.* at 679 (quoting *Missouri, K. & T. R. Co. v. Kansas Pacific R. Co.*, 97 U.S. 491, 497 (1878)); *cf. St. Joseph & Denver City R. Co. v. Baldwin*, 103 U.S. 426, 430 (1880) (Had Congress intended to qualify a pre-1871 ROW grant, "it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."); *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written."). Thus, in reversing the Tenth Circuit, this Court concluded:

> Generations of land patents have issued without any express reservation of the right now claimed by the Government. *Nor has a similar right been asserted before.* . . . This Court has traditionally recognized the special need for certainty and predictability

> where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.

Id. at 687-88 (footnote omitted) (emphasis added).

Leo Sheep is equally applicable here. First, the United States' assertion that it retained implied reversionary interests in 1875 Act ROWs is of recent vintage. *See Amerada Hess Corp.*, 24 IBLA 360, 365-370 (1976) (ruling an 1875 Act ROW is an easement and the United States did not impliedly reserve the mineral estate when the underlying land was patented into private ownership); *Wyoming v. Udall*, 379 F.2d at 640 (noting that the United States conceded that with post-1871 ROW grants, "title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract"); *Beres I*, 64 Fed. Cl. at 426 (suggesting that the United States' assertion that it retained an implied reversionary interest in 1875 Act ROWs may have been prompted by passage of the National Trails System Improvements Act of 1988).

Second, it is undisputed that the United States did not expressly reserve a reversionary interest in the 1875 Act. App. 69-71. Nor did the Patent expressly reserve a reversionary interest in the 1875 Act ROW. App. 76-79. Instead, in accordance with Section 4 of the 1875 Act the Patent merely provides that the Brandts' property is "SUBJECT TO those rights for railroad purposes as have been granted to

the Laramie Hahn's Peak & Pacific Railway Company. . . ." App. 78. As explained by the extant DOI regulation, this language does not reserve an interest; it merely advises that the patented land is burdened by an easement. App. 75 ("the patentee takes the fee subject only to the railroad company's right of use and possession"); *see Smith v. Townsend*, 148 U.S. 490, 499 (1893) (Interpreting post-1871 railroad ROW act and concluding, "[d]oubtless whoever obtained title from the government . . . through which ran this right of way would acquire a fee to the whole tract, *subject to the easement* of the company; and if ever the use of that right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land." (emphasis added)); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1016-24 (S.D. Ind. 2005) (patentee receives land underlying 1875 Act ROW "subject to" an easement for railroad purposes). Once the easement is abandoned, the easement is extinguished and the underlying fee is no longer burdened. *City of Aberdeen v. Chicago & N. W. Transp. Co.*, 602 F. Supp. 589, 593 (D.S.D. 1984) ("As a mere easement, once a railroad ceases using for railroad purposes a right-of-way granted after 1871, it disappears and the underlying landowner has the *use* of property he already *owns*." (emphasis in original)). As a result, if the United States had wanted to retain a reversionary interest in the 1875 Act ROW, it had an obligation to expressly reserve such an interest, just as it "reserv[ed]" a ROW "for ditches or canals" and two road easements in the Patent. App. 76-77; *Leo*

Sheep, 440 U.S. at 678-82 (expressed reservations in a patent negate the existence of implied reservations).

Accordingly, the Tenth Circuit's ruling that the United States retained an implied reversionary interest in the 1875 Acts ROW is in conflict with this Court's precedent regarding the sanctity of patents and this Court's ruling in *Leo Sheep*. Therefore, this Court should grant review to resolve this conflict.

III. THE TENTH CIRCUIT'S RULING THAT THE UNITED STATES RETAINED AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS CONFLICTS WITH DECISIONS FROM THE FEDERAL AND SEVENTH CIRCUITS.

In affirming the district court that the United States retained an implied reversionary interest in the 1875 Act ROW, the Tenth Circuit ruled that it had to follow "circuit precedent[,]" primarily *Marshall*.[8]

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[8] Other Tenth Circuit decisions after *Marshall* have not independently analyzed whether the United States retained an implied reversionary interest in 1875 Act ROWs. *Phillips Co. v. Denver & Rio Grande Western R.R. Co.*, 97 F.3d 1375 (10th Cir. 1996); *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227 (10th Cir. 2006). In *Phillips*, the issue was whether authorization from the ICC to abandon an 1875 Act ROW was a prerequisite for judicial decree of abandonment under 43 U.S.C. § 912. 97 F.3d at 1376. In *Nicodemus*, the issue was whether the interpretation of federal railroad acts involved a federal question. 440 F.3d at 1234-37. In a footnote, the Tenth Circuit stated only that 43

(Continued on following page)

App. 5-6. As demonstrated below, the Tenth Circuit's reasoning in *Marshall* was erroneous and has been rejected by the Federal and Seventh Circuits.

A. The Tenth Circuit Incorrectly Ruled That The United States Retained An Implied Reversionary Interest In 1875 Act ROWs.

In *Marshall*, a railroad holding an 1875 Act ROW applied to the ICC for abandonment of its ROW. 31 F.3d at 1028-29. Before the ICC approved the abandonment, the railroad had transferred all its interest in the ROW to third parties. *Id.* at 1029. Thereafter, the underlying fee owners filed suit against the railroad and its grantees seeking a judicial decree of abandonment under 43 U.S.C. § 912 and a declaration quieting title in the ROW in their favor. *Id.* The railroad and its tranferees defended by arguing that 43 U.S.C. § 912 did not apply to 1875 Act ROWs. *Id.* at 1030. The district court ruled that 43 U.S.C. § 912 applies to 1875 Act ROWs, issued a judicial decree of abandonment, and quieted title in favor of the underlying fee owners. *Id.* at 1029-30.

On appeal, the Tenth Circuit affirmed that 43 U.S.C. § 912 applies to 1875 Act ROWs. *Id.* at 1032. In so doing, the Tenth Circuit concluded that 43 U.S.C. § 912 evinces Congress' belief that the United

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U.S.C. § 912 applied to pre-1871 ROWs that were limited fees. *Id.* at 1236 n.9.

States retained an implied reversionary interest in 1875 Act ROWs. *Id.* at 1031 (In passing 43 U.S.C. § 912, "'Congress clearly felt that it had some retained interests in [1875 Act] railroad right-of-way.'" (quoting *State of Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985) ("*Oregon Short Line*"))). Based upon *Oregon Short Line*, the Tenth Circuit also suggested that 43 U.S.C. § 912 must apply to 1875 Act ROWs, otherwise 43 U.S.C. § 912 would have no meaning. *Marshall*, 31 F.3d at 1032. Then, by applying 43 U.S.C. § 912, the Tenth Circuit ruled that this implied reversionary interest was transferred to the underlying fee owners. *Id.* at 1031-32. Although the outcome that the underlying fee owners owned the ROW was correct, the Tenth Circuit's reasoning reveals three fundamental errors.

First, the Tenth Circuit erred when it ruled that 43 U.S.C. § 912 was "designed to cover the situation where the United States grants a railroad company a right of way *over* public lands and thereafter conveys" the underlying fee. *Id.* at 1032 (emphasis added). This ruling cannot be squared with the plain language in 43 U.S.C. § 912, that it applies only when "*public lands* of the United States have been or may be *granted* to any railroad company for use as a right of way for its railroad. . . ." App. 72 (all emphasis added). Use of the terms "public lands" and "granted," indicates that Congress intended 43 U.S.C. § 912 to apply only to those ROWs that were limited fees. This conclusion is supported by other language in 43 U.S.C. § 912 that provides "the transfer of such

lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land. . . ." App. 73. ROWs that are easements do not afford the United States the luxury of reserving minerals. *Great Northern*, 315 U.S. at 275 ("[I]t is improbable that Congress intended by [the 1875 Act] to grant more than a right of passage, let alone mineral riches."). It is undisputed that the Brandts own the minerals underlying the ROW. App. 59. This is entirely consistent with the conclusion that the 1875 Act ROW was an easement; yet, entirely inconsistent with the Tenth Circuit's ruling that the United States retained an implied reversionary interest.

Second, the Tenth Circuit erred when it ruled that 43 U.S.C. § 912 must apply to 1875 Act ROWs, otherwise 43 U.S.C. § 912 would have no meaning. *Marshall*, 31 F.3d at 1032. The flaw with this ruling is that the Tenth Circuit was trying too hard to give 43 U.S.C. § 912 meaning vis-à-vis 1875 Act ROWs while ignoring what happened before and after passage of 43 U.S.C. § 912. Congress passed 43 U.S.C. § 912 to remedy this Court's decision in *Stringham* that 1875 Act ROWs were limited fees made on an implied condition of reverter. Indeed, this is evident from 43 U.S.C. § 912's plain language (App. 72-73) and its legislative history:

> The [1875 Act], *under which most of the rights of way over public lands have been granted* contains a provision for forfeiture. . . . Under the decision of the courts

> railroad companies receiving such grants take a qualified fee with an implied condition of reverter in the event the companies cease to use the lands for the purposes for which they were granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes the property of the United States.
>
> * * *
>
> It seemed to the committee that such abandoned or forfeited strips are *of little or no value* to the Government and that in case of lands in the rural communities they ought in justice become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent.

H.R. Rep. No. 217, 67th Cong., 1st Sess., quoted in S. Rep. No. 388, 67th Cong., 2nd Sess., at 1-2 (all emphasis added). Thus, 43 U.S.C. § 912 was Congress' attempt to rid the United States of the little strips of land it was saddled with as a result of *Stringham*. *Id.*

In fact, this is the very conclusion reached by the Court of Federal Claims in *Beres I*, 64 Fed. Cl. at 419 ("It would appear that the language of the [43 U.S.C. § 912] was intended to address, clarify, and resolve issues created by the imprecise language employed by the courts on this subject in the early part of the

twentieth century. . . ."); [9] *see also City of Aberdeen*, 602 F. Supp. at 592-93 ("The legislative history of [43 U.S.C. § 912] reveals that it was intended to resolve the problem of what to do with the narrow strips of land used as railroad rights-of-way once they were abandoned by the railroad company."). Moreover, in *Great Northern* this Court effectively eliminated Congress' perceived problem vis-à-vis 1875 Act ROWs when it rejected *Stringham* and reaffirmed that 1875 Act ROWs were easements. That *Great Northern* may have ended any application of 43 U.S.C. § 912 to 1875 Act ROWs is immaterial.[10] Indeed, this Court can limit the applicability of statutes simply because it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("It is this Court's responsibility to say what a statute means. . . . A judicial construction of a statute is an authoritative statement of what the statute

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[9] Importantly, the Court of Federal Claims rejected the reasoning in *Marshall* and held that the United States did not retain an implied reversionary interest in 1875 Act ROWs. *Beres I*, 64 Fed. Cl. at 419-28. The Court of Federal Claims later reaffirmed this conclusion when it held that the scope of an 1875 Act ROW did not include the right to construct a public recreational trail. *Beres v. United States*, 104 Fed. Cl. 408, 443-57 (2012) ("*Beres II*").

[10] Arguably, 43 U.S.C. § 912 still applies to pre-1871 ROWs that are "tantamount" to fee interests. *See* Solicitor's Opinion M-37025, *supra*, at 2-9.

meant before as well as after the decision of the case giving rise to that construction.").

Third, the Tenth Circuit placed too much emphasis on Congress' intent in 1922 when it passed 43 U.S.C. § 912. *Marshall*, 31 F.3d at 1032. Congress' intent in 1922 could not alter Congress' intent in passing the 1875 Act or redefine previously granted property interests. *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 875 (1999) ("public land statutes should be interpreted in light of 'the condition of the country when the acts were passed'" (quoting *Leo Sheep*, 440 U.S. at 682); *United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *see Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) (New views as to the scope of property interests "arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions."). As explained in *Great Northern*, after 1871, Congress intended to grant railroads only an easement and that is exactly what it did in passing the 1875 Act. 315 U.S. at 274-79. Thus, in 1908, when the United States granted the 1875 ROW in this case, it granted an easement. Even if Congress could later redefine that previously granted ROW to be a limited fee with an implied condition of reverter, there is no evidence that it did. Instead, the plain language of 43 U.S.C. § 912 proves that Congress was not redefining property interests, but

trying to avoid being saddled with little strips of land. Therefore, notwithstanding what Congress may have intended in passing 43 U.S.C. § 912, that could not alter Congress' intent in passing the 1875 Act or redefine previously granted 1875 Act ROWs.

B. The Federal And Seventh Circuits Have Rejected The Tenth Circuit's Reasoning And Concluded That The United States Did Not Retain An Implied Reversionary Interest In 1875 Act ROWs.

In *Hash*, the Federal Circuit dealt with a class action that included landowners who traced their title to patents issued "subject to" an 1875 Act ROW. 403 F.3d at 1313-17. These landowners sought just compensation for a taking arising from the conversion of an 1875 Act ROW into a recreational trail. *Id.* at 1310. The United States defended by arguing that, under *Marshall* and 43 U.S.C. § 912, it retained an implied reversionary interest in the 1875 Act ROW. Brief for Appellee the United States, *Hash v. United States*, Federal Circuit No. 03-1395, 2003 WL 25291552. The Federal Circuit rejected the United States' argument that it retained an implied reversionary interest:

> We conclude that the land . . . is owned in fee by the landowners, subject to the railway easement. . . . On the railway's abandonment of its right-of-way these owners were disencumbered of the railway easement. . . .

Hash, 403 F.3d at 1318; *accord Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1370-74 (Fed. Cir. 2009).

More recently, in *Samuel C. Johnson 1988 Trust v. Bayfield County, Wisconsin*, 649 F.3d 799, 803-04 (7th Cir. 2011), the Seventh Circuit concluded that 1875 Act ROWs are easements and that the United States did not retain a reversionary interest after the underlying land was patented into private ownership. In reaching this conclusion, the Seventh Circuit considered, but rejected, the reasoning in *Marshall*:

> [*Hash*] and [*Beres I*] . . . make better sense than *Marshall*, as well as being supported by the characterization in [*Great Northern*], of the rights of way created under the 1875 Act as "easements." . . . If *Marshall* was correctly decided, no one in 2011 who owned land subject to the 1875 Act – that is, land over which there had once been a federal railroad right of way – has a right to prevent the federal government from recapturing the right of way – of course without compensation – and giving it away or selling it. . . .

Id.

As the foregoing demonstrates and as acknowledged by the Tenth Circuit, there is a split in the circuits as to whether the United States retained an implied reversionary interest in 1875 Act ROWs. App. 5-6; *see also City of Aberdeen*, 602 F. Supp. at 592-93 (no implied reversionary interest in 1875 Act ROWs); *Vieux v. East Bay Reg'l Park Dist.*, 906 F.2d 1330,

1335 (9th Cir. 1990) (stating in dictum that 43 U.S.C. § 912 applies to both pre- and post-1871 railroad ROWs). In addition, there is uncertainty among the state courts on this same issue. *Compare Brown v. N. Hills Reg'l R.R. Auth.*, 732 N.W.2d 732, 740 (S.D. 2007) (no implied reversionary interest) *with Whipps Land & Cattle Co. v. Level 3 Communications, LLC*, 658 N.W.2d 258, 266-67 (Neb. 2003) (implied reversionary interest); *Brown v. State*, 924 P.2d 908, 916 (Wash. 1996) (same). Accordingly, this Court's review is vital to resolve the circuit split, dispel the uncertainty in the state courts, and to restore "certainty and predictability" regarding lands patented "subject to" 1875 Act ROWs. *See* Petition of the United States for Panel Rehearing, *Hash v. United States*, Federal Circuit No. 03-1395, 2005 WL 4814437, *8 (United States arguing that, because the Federal Circuit disagreed with *Marshall* and, thereby, created a split, similarly situated landowners could own different property interests).

IV. THE ISSUE WHETHER THE UNITED STATES RETAINED AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS IS OF NATIONAL IMPORTANCE AND THIS CASE PRESENTS THE IDEAL OPPORTUNITY TO RESOLVE THAT ISSUE.

The 1875 Act was a huge success as thousands of miles of 1875 Act ROWs exist across the United

States.[11] App. 80 (DOI advising that thousands of miles of 1875 Act ROWs still exist); *see* Cecilia Fex, *The Elements of Liability in A Trails Act Taking: A Guide to the Analysis*, 38 Ecology L.Q. 673, 687 (2011) (The 1875 Act "resulted in railroads crisscrossing public lands nationwide."); U.S. Department of the Interior, *Annual Reports of the Department of the Interior for the Fiscal Year Ended June 20, 1904*, 494-502 (1904) (listing over 400 railroad companies that had been granted 1875 Act ROWs). In accordance with Congress' intent, most of the lands underlying these ROWs were patented to settlers under the various Homestead Acts "subject to" the 1875 Act ROW. *See* App. 70-71, 78. Through the years, many of these homesteads were subdivided, so the number of landowners whose land is burdened by 1875 Act ROWs could be in the thousands, if not more. *See Beres II*, 104 Fed. Cl. at 413 (listing over 30 landowners who traced their title to one patent issued "subject to" an 1875 Act ROW). As these railroad ROWs are abandoned, the issue of ownership will necessarily arise. Landowners within the Seventh Circuit may be able to quiet title to abandoned 1875 Act ROWs and, thereby, prevent their land from becoming a public recreational trail. In contrast, similarly situated landowners in the Tenth Circuit will not be able to quiet title, but will have to try to seek just compensation – which would be paid for by the

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[11] The issue in the case affects more than just 1875 Act ROWs. It is generally applicable to post-1871 railroad ROWs.

taxpayers.[12] Just compensation, however, is cold comfort for having to endure the disruption and inconvenience of having essentially a "linear park" on one's property:

> [I]t appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving tracks, depots, and the running of trains.

Toews, 376 F.3d at 1376. Because Congress did not intend for this result when it passed the 1875 Act and authorized the patenting of land "subject to" 1875 Act ROWs, this Court's review is imperative.

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[12] Just compensation is not guaranteed because the statute of limitations could be an obstacle for many landowners. *See* Comment, *Statutes of Limitations in Rails-to-Trails Act Compensation Claims: The U.S. Court of Appeals for the Federal Circuit Bends the Rules of Takings Law*, 56 Cath. U. L. Rev. 1307, 1324-38 (2007).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Counter-Defendant-Appellee,

v.

MARVIN M. BRANDT, Trustee of the Marvin M. Brandt Revocable Trust, MARVIN M. BRANDT REVOCABLE TRUST,

Defendants-Counter-Claimants-Appellants,

and

DANIEL K. McNIERNEY, SUSAN McNIERNEY; GINNY L OTTERSTEIN; LAWRENCE R OTTERSTEIN; NORMA J. BREAZEALE,

Defendants-Counter-Claimants,

and

WYOMING AND COLORADO RAILROAD COMPANY, INC.; GARY WILLIAMS; JOAN WILLIAMS; GLENNA MARRS; KENNETH R. LANKFORD, II; KENNETH R. LANKFORD, SR.;

No. 09-8047
(D.C. No. 2:06-CV-00184-ABJ)
(D. Wyo.)

PATRICK R RINKER; PATRICIA A. RINKER; RONDAL WAYNE; EDMUND L GRUBER; KATHLYNN A. LAMBERT; DAVID M. PEARCE; DOROTHY M. PEARCE; ROBERT S. PEARCE; STEVEN M. PEARCE; TOBIN L. RATLIFF; LYNDA L. RINKER; PATRICK R RINKER; JANIS A. TAFFEE; STEVEN P. TAFFEE,

Defendants.

RAILS TO TRAILS CONSERVANCY,

Amicus Curiae.

ORDER AND JUDGMENT*

(Filed Sep. 11, 2012)

Before **KELLY**, **O'BRIEN**, and **HOLMES**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The Marvin M. Brandt Revocable Trust and Mr. Brandt, Trustee, appeal from the district court's judgment quieting title in the United States to certain property that crosses the trust's property. *United States v. Marvin M. Brandt Revocable Trust*, 2008 WL 7185272 (D. Wyo. 2008). The parties are familiar with the facts and we need not restate them here. Suffice it to say that the subject property is part of an abandoned right-of-way granted a railroad pursuant to the General Railroad Right-of-Way Act of 1875, 43 U.S.C. § 934 ("1875 Act") and a nearby government road, Forest Service Road 512.

A. The Railroad Right-of-Way

The trust argues that the 1908 right-of-way granted to the railroad (pursuant to the 1875 Act) is like an ordinary easement that has been extinguished. It reasons as follows. The 1976 patent issued to the trust's predecessors-in-interest did not reserve to the United States any interest in this easement; it merely provided that the property was subject to the easement for railroad purposes.[1] Thus, when the

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[1] The pertinent portions provide:

EXCEPTING AND RESERVING TO THE UNITED STATES from the land granted a right-of-way thereon for ditches or canals constructed by the authority of the United States; and

RESERVING TO the United States, and its assigns, a right-of-way for the existing Platte Access Road No. 512 over and across Tract No. 37 . . containing 3.30 acres, more or less; and

(Continued on following page)

railroad administratively abandoned the easement (by notifying the Surface Transportation Board ("STB") on January 15, 2004 that it would exercise its authority to abandon the line), the easement was extinguished and the trust's property was disencumbered. Because the United States lacked any ownership interest (as of October 4, 1988) in the right-of-way, it could not claim through 16 U.S.C. § 1248(c) which generally provides that the United States retains rights in abandoned or forfeited railroad grants. Nor could the United States claim through 43 U.S.C. § 912, which generally provided that the interest in the right-of-way went to the adjacent landowner

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> RESERVING TO the United States, and its assigns, a right-of-way for the existing Dry Park Road No. 517, over and across Tract 37 . . . containing 0.71 acres, more or less.
>
> Provided, that if for a period of five years, the United States, or its assigns, shall cease to use the above roads, or any segment thereof, for the purposes reserved, or if at any time the Regional Forester determines that the roads, or any segment thereof, is no longer needed for the purposes reserved, the easement traversed thereby shall terminate. In the event of such nonuse or such determination by the Regional Forester, the Regional Forester shall furnish to the patentees or, their heirs or assigns, a statement in recordable form evidencing termination.
>
> SUBJECT TO those rights for railroad purposes as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns by permit Cheyenne 04128 under the Act of March 3, 1875, 43 U.S.C. 934-939.

Aplt. App. 92-93.

given abandonment decreed by a court of competent jurisdiction or an Act of Congress. The trust argues that the district court should have quieted title in it, not the United States.

Much of the trust's argument is foreclosed by circuit precedent which we are bound to follow. *See United States v. Spedalieri*, 910 F.2d 707, 709 n.2, 710 n.3 (10th Cir. 1990). In *Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028, 1030-32 (10th Cir. 1994), we held that § 912 applies to grants under the 1875 Act. Relying upon *Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 207 (D. Idaho 1985), we concluded that the United States retained an implied reversionary interest. *Marshall*, 31 F.3d at 1032. We subsequently applied § 912 on the issue of whether a railroad had abandoned its right-of-way such that adjacent landowners would take in *Phillips Co. v. Denver & Rio Grande Western R.R.*, 97 F.3d 1375 (10th Cir. 1996). And we have recognized that § 912 was modified by 16 U.S.C. § 1248(c) to provide that, as of October 4, 1988, interests in abandoned railroad rights-of-way generally revert to the United States rather than adjacent landowners. *See Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1236 n.9 (10th Cir. 2006); *Phillips*, 97 F.3d at 1376 n.4. We are unpersuaded by the remainder of the trust's other arguments and efforts to distinguish and limit the obvious contrary precedent. Though we recognize that the Seventh Circuit, the Federal Circuit and the Court of Federal Claims have concluded that the United States did not retain any reversionary

interest in these railroad rights-of-way, we are bound by our precedent. *See Samuel C. Johnson 1988 Tr. v. Bayfield County*, 649 F.3d 799, 803-04 (7th Cir. 2011); *Hash v. United States*, 403 F.3d 1308, 1317 (Fed. Cir. 2005); *Beres v. United States*, 64 Fed. Cl. 403, 427-28 (2005). *But see* Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift"*, 82 U. Colo. L. Rev. 85, 150-64 (2011) (criticizing this interpretation). Thus, the district court correctly held that the interest in the abandoned railroad right-of-way belongs to the United States.

B. Forest Service Road 512

The trust argues that the 1976 patent reserved a certain right-of-way in Road 512 and provided that it would terminate if the United States ceased to use the road or any segment. *See supra* n.1. The trust argues that it made a conclusive showing that an obliterated segment of the Road 512 easement had not been used for five years and therefore, title should have been quieted in the trust, not the United States. Aplt. Br. 48; Aplt. Reply Br. 25. The trust relies upon the following: (1) the Forest Service published a decision memorandum closing and obliterating a portion of the road and removed the road surface, leveled the area, and planted grass on a smaller portion, and (2) Mr. Brandt declared that, to the best of his knowledge, the Forest Service had not used any part of the easement for five years and took issue with certain statements of Forest Service

personnel about some of the claimed use. Aplt. App. 101; Aplee. Supp. App. 1-2. The trust argues that the United States failed to present any evidence that the obliterated portion had been used, and therefore the entire Road 512 easement terminated.

The district court considered the trust's argument that non-use of Road 512 terminated the easements for Roads 512 *and* 517. *Marvin M. Brandt Revocable Trust*, 2008 WL 7185272 at *16 & *17-18. That is precisely the argument the trust made in response to the United States' motion for summary judgment. 2:06-cv-00184-ABJ, ECF Doc. 147 at 25-26. In its own motion for summary judgment, the trust argued, consistent with its counterclaim, that non-use of Road 512 terminated the easement for only Road 512. Aplt. App. 72; 2:06-cv-00184-ABJ, ECF Doc. 140 at 22-23.

The district court held that the trust could not create a genuine issue of material fact as to non-use of Road 512 based upon Mr. Brandt's affidavit that the Forest Service did not use the closed portion of Road 512. *Marvin M. Brandt Revocable Trust*, 2008 WL 7185272 at *17-18. The trust admits that Road 512 has been used as a private road and Mr. Brandt allows the Forest Service, law enforcement, and emergency personnel to enter through a gate at the south end. Aplt. App. 71; Aplee. Supp. App. 2; Aplt. Reply Br. 24-25. Instead, the trust argues that the evidence submitted by the United States, Aplt. App. 151-56, listing over 30 incidents of use simply does

not establish that the obliterated segment of Road 512 was used from 1996-2003.

Even assuming that the trust could create a genuine issue of material fact as to use of the obliterated portion of Road 512,[2] we would reject the contention that non-use of part of the road is sufficient to terminate the entire easement, be it Road 512 or Road 517, or both. The meaning of "the easement traversed thereby," which defines what terminates upon non-use, is the operative language. So as to give effect to all of the terms, "the easement traversed thereby" refers back to non-use of "the above roads [Road 512 or 517], *or* "any segment thereof." The trust's reading essentially eliminates "any segment thereof." Moreover, the language refers to easement in the singular which is completely at odds with the argument the district court considered: that non-use of one of the roads, or a segment thereof, results in termination of both easements, no matter the use being made of each. We note that the trust did not contend (either in its counterclaim or in the briefing) that non-use of a segment of Road 512 results in the termination of the easement in that segment, and we do not address it.

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[2] We reject the trust's contention that the United States failed to provide any evidence of use of the obliterated portion. *See* Aplt. App. 151-56; Aplee. Supp. App. 8-11. Such a conclusion would be particularly anomalous given summary judgment standards which require that the evidence be viewed in the light most favorable to the non-movant. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

See Somerlott v. Cherokee Nation Distribs. Inc., 686 F.3d 1144, 1151-52 (10th Cir. 2012).

AFFIRMED.

Entered for the Court

Per Curiam

O'BRIEN, J. concurring.

I join the Order and Judgment. I write separately for a collateral reason. After oral argument I was designated as author. Recently, because he was concerned with the delay in disposition, Judge Kelly reassigned the case and prepared the Order and Judgment. I am solely responsible for, and deeply regret, all delay in resolving this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. MARVIN M. BRANDT REVOCABLE TRUST, and MARVIN M. BRANDT, Defendants.	Case No. 06-CV-184-J

MEMORANDUM OPINION AND ORDER

(Filed Apr. 8, 2008)

This matter comes before the Court on cross motions for summary judgment. The Court, having carefully reviewed the motions and the materials filed in support thereof and opposition thereto, and being fully advised in the premises, **FINDS** that plaintiff's Motions for Summary Judgment on cross claims should be **GRANTED** and defendant's Motion for Summary Judgment should be **DENIED** for the reasons stated below:

BACKGROUND OF CASE

Plaintiff United States (the "Government") brings this action seeking a judicial declaration of abandonment

of approximately 66 miles of railroad right-of-way running from Laramie, Wyoming to the Colorado border by way of Fox Park, Wyoming. Upon abandonment, the United States also seeks to quiet title to the abandoned railroad right-of-way in the Government. Defendant, Marvin M. Brandt Revocable Trust and Marvin Brandt, trustee, (collectively "the Trust") assert that the Trust has a vested interest in the railroad right-of-way and opposes the Government's claim. The Trust also seeks to have the title to the railroad right-of-way quieted in its favor. Pursuant to Fed. R. Civ. P. 13(b), the Trust also filed a counterclaim seeking to quiet title to a right-of-way easement for Forest Service Road ("FSR") 512. The Trust claims the easement has been terminated by the United States Forest Service. The road at issue also runs through land owned by the Trust in Fox Park, Wyoming. The Government disputes the road easement has been terminated and alleges that the express conditions of abandonment contained in the original deed have not been met. The Government filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) on the railroad right-of-way and FSR issues and the Trust reciprocated in kind.

PROCEDURAL BACKGROUND

The Government filed its complaint with this Court in July of 2006. It seeks a declaratory judgment that the Wyoming-Colorado ("WYCO") Railroad Company, Inc. right-of-way, lying within the Medicine Bow National Forest in the State of Wyoming, had

been abandoned. The Government also initiated this action against twenty-six separate parties who may have claimed an interest in the right-of-way. On August 8, 2006, the Trust filed a counterclaim seeking to quiet title to the railroad right-of-way in the Trust. Also on August 8, 2006, the Trust filed a second counterclaim against the Government seeking to quiet title to a 0.2 mile section of FSR 512. On October 1, 2007, the Trust amended its second counterclaim regarding the 0.2 mile section of FSR 512 to include the entirety of FSR 512 that crosses the Trust's property (approximately 0.7 miles).

On October 10, 2007 the Government filed a motion for summary judgment and a brief in support of its motion against the Trust. Also on October 10, 2007, the Trust filed a motion for and brief in support of summary judgment on its railroad right-of-way counterclaim and its FSR 512 counterclaim against the Government. On November 13, 2007 the Trust filed its "Brief In Opposition" to the Government's motion for summary judgment disputing the Government's interest in the railroad right-of-way and seeking to have all right, title, and interest in the railroad right-of-way quieted in the trust. Further, the Trust argues that to quiet title in the Government would constitute a Fifth Amendment taking requiring just compensation. That same day, the Government filed its response to the Trust's motion for summary judgment on the railroad right-of-way. Since the parties' last motions were filed, all parties but the Trust have settled with the Government. Thus, the

current action between the Government and the Trust is the only matter remaining for this Court to decide.

APPLICABLE FACTS AND PARTIES' ARGUMENTS ON RAILROAD RIGHT-OF-WAY REVERSION

FACTUAL BACKGROUND

HISTORY OF THE RAILROAD RIGHT-OF-WAY

In 1908, the Laramie, Hahn's Peak and Pacific Railroad Company ("LHPPR") was granted a right-of-way (ROW) for railroad purposes through the public lands of the United States under the General Railroad Right-of-Way Act of 1875, 43 U.S.C §§ 934-030 ("1875 Act"). The grant was for a two-hundred foot wide ROW, approximately 66 miles long. LHPPR completed construction of the railroad from Laramie to Colorado in 1911. Later, the Trust's predecessor in interest acquired Tract 37, Township 13 North, Range 78 West 6th P.M. by a patent issued from the United States under 16 U.S.C. § 485 for 83.32 acres on February 18, 1976. In November 1987, WYCO became the latest successor to the LHPPR Company.

On May 15, 2001, WYCO filed a Notice of Intent to Abandon Rail Service with the Surface Transportation Board ("STB"). The STB approved the abandonment petition subject to satisfaction of certain abandonment conditions. The STB removed the last condition thus effecting its approval of the abandonment of the rail line on December 31, 2003. On January 15, 2004, WYCO notified the Secretary of the STB

that it had completed its abandonment of the rail line.

RELEVANT STATUTES

In 1922, Congress passed the Abandoned Railroad Right-of-Way Act, codified at 43 U.S.C. § 912.[1] Section 912 granted to landowners adjacent to previous railroad right-of-way grants any right and title that the United States would have retained upon abandonment. Congress later modified § 912 by passing the National Trails System Improvement Act

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[1] 43 U.S.C. § 912 (1922). Section 912 states in relevant part:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad . . and use or occupancy of said lands for such purposes has ceased, or shall hereafter cease, whether by forfeiture or abandonment by said railroad company *declared or decreed by a court of competent jurisdiction or by Act of Congress*, then and thereupon all right, title, and interest, and estate of the United States, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions *traversed or occupied* by such railroad or railroad structures.

Id. (emphasis added).

of 1988, codified at 16 U.S.C. § 1248(c).[2] By modifying § 912, the United States retained any and all rights and interests in abandoned railroad rights-of-way that would have been otherwise granted to adjacent landowners under § 912 so long as those rights-of-way had not been utilized as a public highway within one year of abandonment. Section 912 requires a judicial decree or Act of Congress to relinquish the claim the Government retained upon abandonment. As of the date of this memorandum no judicial decree of abandonment of the railroad ROW has occurred.

THE GOVERNMENT'S ARGUMENTS

The Government contends that Tenth Circuit case law supports its position that, upon abandonment, all right, title, and interest in the railroad ROW reverts to the Government. The Government relies on *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d

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[2] 16 U.S.C. § 1248(c). Section 1248(c) states:

> Abandoned railroad grants; retention of rights: Commencing upon October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of Title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

Id.

1028 (10th Cir. 1994); *Phillips Co. v. Denv. & Rio Grande W. RR Co.*, 97 F.3d 1375 (10th Cir. 1996); and *Nicodemus v. Union Pac. R.R.*, 440 F.3d 1227 (10th Cir. 2006).

In *Marshall*, the owners and successors in interest of property adjacent to an abandoned railroad ROW in Natrona County, Wyoming, brought an action to quiet title against Chicago and Northwestern Transportation Company ("CNWT"). *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994). In 1980, CNWT assigned a 60-foot-wide strip of its 200-foot-wide ROW to an unaffiliated partnership. *Id.* at 1028. The partnership then assigned its interest to Casper Creek Development, Inc. *Id.* CNWT filed an application for abandonment of the ROW with Interstate Commerce Commission, which was approved on November 30, 1988. *Id.* CNWT discontinued its use of the ROW on January 15, 1989. *Id.* In June of 1990, CNWT conveyed the remaining 140 feet width of the ROW to Forgey Ranch Company. *Id.* The company completed track removal near the end of August, 1990. *Id.*

In *Marshall*, the Tenth Circuit affirmed this Court's holding that 43 U.S.C. § 912 applies to both pre-1871 and post-1871 grants for railroad rights-of-way.[1] The Tenth Circuit held in favor of the owners of the adjacent land. The Court reasoned that:

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[1] *See supra* note 1.

> [Section] 912 provides in essence that when public lands of the United States have been granted to any railroad company for use as a right-of-way, and the railroad company thereafter ceases to use and occupy the right of way by, for example, abandonment, as decreed by a court of competent jurisdiction, then all right, title, interest, and estate in the right of way shall be transferred to and vested in anyone to whom or to which title of the United States may have been granted by way of patent to convey the whole of the legal subdivision previously traversed by the right of way.

Marshall, 31 F.3d at 1031. The Tenth Circuit also stated that:

> [Section 912] is designed to cover the situation where the United States grants a railroad company a right of way over public lands and thereafter conveys . . . to another the whole of the legal subdivision[s] . . . traversed or occupied by such railroad. [Which] appears to cover the instant case.

Marshall, 31 F.3d at 1032 (internal citations omitted). Finally, the Tenth Circuit stated: "In enacting these statutes, Congress clearly felt that it had some retained interest in railroad rights-of-way." *Marshall*, 31 F.3d at 1032 (citing *State of Idaho v. Or. Shortline R.R.*, 617 F. Supp. 207 (D. Idaho 1985). Thus the Tenth Circuit held that § 912 applied to rights-of-way like those at issue in *Marshall* and that when those rights-of-way are abandoned, the Government

conveys its *retained* interest to the adjacent landowners. *See id.*

The Government contends the holding in *Marshall* is significant in the instant case because the Tenth Circuit held that under § 912, the United States retained an interest in abandoned 1875 Act railroad rights-of-ways. The instant case concerns a grant for a railroad ROW made under the 1875 Act. Therefore, under the Tenth Circuit's interpretation of § 912 in *Marshall,* the United States retained an interest in the WYCO ROW.

The Government cites *Phillips* for the proposition that under § 1248(c) any right to an abandoned railroad ROW remains in the United States. *Phillips Co. v. Denv. & Rio Grande W. RR Co.*, 97 F.3d 1375 (10th Cir. 1996). In *Phillips,* the owner of land adjacent to a railroad ROW sought a retroactive determination of abandonment and to quiet title to the ROW pursuant to 43 U.S.C. § 912 in order to avoid the effects of 16 U.S.C. § 1248(c). *Id.* The court stated that before § 912 can be given effect it must receive authorization from the Interstate Commerce Commission ("ICC") to abandon the railroad ROW. *Id.* at 1377. The ICC, the agency responsible for approving the abandonment, stated that it had no authority to declare the railroad ROW abandoned retroactively. *Id.* The Tenth Circuit held that it was compelled to defer to the agency. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The Court also held that once § 1248(c) had been enacted, the reversionary interest was held by the

United States and not adjacent landowners. *Id.* at 1376 n. 4.

The Government contends *Phillips* is relevant to the instant case because the plaintiff sought a retroactive declaration of abandonment of the rights-of-way in order to circumvent the grasp of 16 U.S.C. § 1248(c). The Tenth Circuit did not address what role § 1248(c) plays in the final analysis of the case. However, based on the language the Court employed, any right an adjacent landowner received under § 912 was removed by Congress's passage of § 1248(c) in 1988. The Government's reasoning seems in accord with this interpretation.

The Government points to the Tenth Circuit's decision in *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227 (10th Cir. 2006). In *Nicodemus*, landowners sued Union Pacific Corp. for trespass and unjust enrichment arising from the railroad's grant of subsurface easements to telecommunications providers for the right to install fiber-optic cables in its railroad ROW. *Nicodemus*, 440 F.3d 1227. The District Court of Wyoming dismissed the action for lack of federal question jurisdiction. *Nicodemus v. Union Pacific Corp.*, 204 F.R.D. 479, 493 (D. Wyo. 2001) (holding the interpretation of federal land grants to railroads is not a substantial question of federal law so as to afford federal question jurisdiction over state law claims). The Tenth Circuit disagreed with this Court's decision. *Nicodemus*, 440 F.3d at 1229 (10th Cir. 2006). It held that the interpretation of federal land

grants involved a substantial federal issue deserving of the federal forum for resolving the issue. *Id.*

The Tenth Circuit stated that under 43 U.S.C. § 912:

> [L]and given by the United States for use as a railroad right-of-way in which the United States retained a right of reverter under *N. Pac. R.R. v. Townsend,* 190 U.S. 267 (1903) must be turned into a public highway within one year of . . . abandonment or be given to the adjacent land owners.

Nicodemus, 440 F.3d at 1236. The *Nicodemus* court further explained that:

> Subsequently Congress enacted the National Trails System Improvement Act of 1988, 16 U.S.C. § 1248(c), under which those lands not converted to public highways within one year of abandonment revert back to the United States, not adjacent private landowners.

Id. Thus, that court held that "the United States has a reversionary interest in the lands when no longer used for the designated purposes . . . [t]hus the government has a direct interest in the determination of property rights granted to the railroad." *Id.* The Government relies on the holding in *Nicodemus* to support its claim of a reversionary interest in the railroad ROW at dispute in the instant case.

Finally, the Government denies the Trust's assertion that to quiet title in the Government constitutes

a Fifth Amendment taking requiring just compensation. The thrust of the Government's argument seems to be that (1) under *Marshall* and *Phillips,* the United States retained a reversionary interest to **all** railroad rights-of-way; (2) under § 912, if the ROW was abandoned by the railroad then the United States conveyed its reversion to the adjacent landowner; (3) section 912 as modified by § 1248(c), retains the reversion held by the United States under § 912 and does not convey it to adjacent landowners; (4) following the reasoning of the Tenth Circuit, the United States never relinquished its reversion prior to abandonment, the railroad ROW never vested in the adjacent landowner, and having never vested, retention of the reverter cannot be viewed as a taking, i.e., you cannot lose what you never possessed. Retaining this reversionary interest, the Government asks this Court to decree the ROW abandoned and to quiet title in the ROW in the Government.

THE TRUST'S ARGUMENTS

The Trust argues that the Government did not retain a reverter in rights-of-way granted under the Act of 1875. Citing recent federal decisions in support of its argument, the Trust contends that this Court should hold consistent with these decisions and grant summary judgment in favor of the Trust. The Trust also offers its line of decisions to support its argument that to quiet title in the Government constitutes a taking requiring just compensation.

The Trust argues that WYCO received only an easement in the Act of 1875. The Trust claims that the Patent reserved a reversion to the owner of the surrounding land and its predecessor-in-interest and reserved nothing for the United States. Citing *Hash v. United States,* 403 F.3d 1308 (Fed. Cir. 2005), the Trust argues that 43 U.S.C. § 912:

> require[d] the United States to convey any rights it may have, to the patentee of the land traversed by the abandoned ROW; it does not say what rights the United States had after the land patent was granted. Indeed, if the United States did have residual rights despite the patented land grant, then the statute, [43 U.S.C. § 912], required that the rights be conveyed to the private owner.

Hash, 403 F.3d at 1318. In *Hash,* landowners brought a class action against the United States challenging the conversion of an abandoned railroad ROW. The district court held in favor of the United States and the plaintiffs appealed. The plaintiffs argued on appeal that the ROW across their land was simply an easement. When the railroad abandoned the ROW the easement would have reverted to them but for the 1983 provisions of the National Trails System Act.

Citing to the United States Supreme Court's reasoning in *Presault v. I.C.C.,* the Federal Circuit Court of Appeals concluded that the land at issue was

owned in fee by the landowners, subject to a railway easement.[4] Upon the railway's abandonment of its ROW, the burdened estate owners were "disencumbered of the railway easement, and upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the *Preseault* cases." *Hash,* 403 F.3d at 1318. The *Hash* court remanded the case to the district court to determine just compensation on the taking. *Id.*

The Trust also points to *Beres v. United States,* 64 Fed.Cl. 403 (2005), decided shortly after *Hash.* In *Beres,* the plaintiffs were fee owners of land that was patented subject to a railroad ROW. *Beres,* 64 Fed.Cl. at 403 (2005). The ROW at issue was transferred pursuant to § 1247(d) to a land conservancy. *Id.* at 407. Looking to legislative history, statutory construction, precedent, and the patent at issue, the *Beres* court held inapposite to this Court and the Tenth

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[4] *Preseault v. ICC,* 494 U.S. 1,4-5 (1990) (holding that *if* abandonment of railway *and* application of the Trails Act effects a taking when the easement would otherwise revert to the owner of the servient estate, the landowner may sue for compensation under the Tucker Act). *See also* 28 U.S.C. § 1491(a)(1) (1982). The Tucker Act provides that the United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *Id.*

Circuit.[5] In essence, the *Beres* court held that when Congress passed 43 U.S.C. § 912 it did so to confirm the absence of any reversionary interest in the United States and that the land, in agreement with congressional intent, was reserved for homesteaders and for educational purposes. *Id.* at 425-27. Moreover, the *Beres* court held that when Congress passed 16 U.S.C. § 1248(c) in 1988, the federal government no longer held any reversionary rights in the land granted to the plaintiff's predecessor-in-interest and that 16 U.S.C. § 1248(c) should not apply to the 1875 Act which "intentionally omitted any words to create a reversionary right in the United States." *Id.*

Finally, the Trust refutes the arguments and case law the Government offers as support relying instead on *Beres* and *Hash*. In essence, the Trust lobbies this Court to find the favorable holdings in *Beres* and *Hash* persuasive even though the controlling Tenth Circuit's reasoning was rejected in those cases.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact to be resolved at trial. FED. R. CIV. P. 56(c); *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Thus, a district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file,

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[5] *See e.g. Marshall*, 31 F.3d 1028 (10th Cir. 1994).

together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Nelson v. Geringer,* 295 F.3d 1082, 1086 (10th Cir. 2002). "An issue of material fact is genuine where a reasonable jury could return a verdict for the party opposing summary judgment." *Seymore v. Shawver & Sons, Inc.,* 111 F.3d 794, 797 (10th Cir. 1997).

In applying these standards, the district court will view the evidence in the light most favorable to the party opposing summary judgment. *Jenkins v. Wood,* 81 F.3d 988, 990 (10th Cir. 1996). The movant bears the initial burden of demonstrating the absence of evidence to support the non-moving party's claims. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). When the non-moving party bears the burden of proof at trial, the burden then shifts to it to demonstrate the existence of an essential element of its case. *Id.* To carry this burden, the non-moving party must go beyond the pleadings and designate specific facts to show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986); *Ford v. West,* 222 F.3d 767, 774 (10th Cir. 2000). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward,* 125 F.3d 1341, 1347 (10th Cir. 1997).

DISCUSSION

Three points seem significant in analyzing the parties' arguments. First, the case law offered by the Government is the law of this circuit. Second, the case law offered by the Trust is inapposite to the law of this circuit. In fact, the Tenth Circuit's reasoning is expressly rejected in both *Hash* and *Beres*. Third, the conditional statement proffered by the United States Supreme Court in *Preseault,* which *Hash* relies on, does not result in a finding for the Trust.

Points one and two illustrate that there is an obvious split in decisions among the federal circuit courts. The Ninth Circuit has held that the United States retains a reversionary interest in ROW grants. *See Vieux v. East Bay Regional Park District,* 906 F.2d 1330, 1335 (9th Cir. 1990) (holding that § 912 applies to grants made both before and after 1871 and the United States retains a reversionary interest in those grants of ROW). The Tenth Circuit has held that the United States retains a reversionary interest in all 1875 Act ROWs. *See e.g. Marshall,* 31 F.3d at 1032 (10th Cir. 1994) (holding that § 912 was specifically enacted to dispose of the United States retained interest in 1875 Act rights-of-way). The Seventh Circuit also has held that § 1248(c) "modifies § 912 to the extent that now those lands not converted to public highways . . . revert to the United States." *Mauler v. Bayfield County,* 309 F.3d 997, 999 (7th Cir. 2002) ("Clearly Congress assumed the United States retained a reversionary interest in railroad rights-of-way, else it would make little sense for Congress to

have passed laws like § 912 . . . [and] § 1248(c)). Interestingly, the Tenth Circuit points directly to *Mauler* as a guide to the statutory framework regarding disposition of railroad ROWs. *Nicodemus*, 440 F.3d at 1236 n. 9 ("For a general overview of this statutory scheme, *see Mauler v. Bayfield County.*").

Conversely, the Federal Circuit and the Federal Claims Court have held that unless the patent granting the adjacent land expressly retains a reversion, no reversion can be inferred. *See e.g. Hash*, 403 F.3d at 1314 (stressing the "well-recognized rule that property rights that are not explicitly reserved by the grantor cannot be inferred to have been retained"). Even in light of the split in the circuits, this Court is bound to follow the law promulgated by the Tenth Circuit and to hold that the government retained a reversionary interest in 1875 Act rights-of-way even in light of the language contained in § 912.

Point three illustrates how the Federal Circuit's *Hash* decision relies on the United States Supreme Court's holding in *Preseault v. United States* for the general rule that where a taking occurs, just compensation should be received. *See Hash*, 403 F.3d 1308 (Fed. Cir. 2005); *Beres*, 64 Fed. Cl. 403 (2005). However, while the Supreme Court does offer that "even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners," the primary issue that faced the Court was whether reversions under the Rails-to-Trails act were constitutional under the Commerce Clause. *See generally Preseault*, 494 U.S. 1 (1990). The issue was not whether they constituted a compensable taking. *See id.* Further,

the *Preseault* Court noted that The Tucker Act, 28 U.S.C. § 1491(a)(1), provides exclusive jurisdiction in the United States Claims Court "for any claim against the Federal Government to recover damages" in excess of $10,000. *Id.* at 11. The Court also held that the Federal Claims Court has jurisdiction over any 16 U.S.C § 1247(d) takings claims in light of the Tucker Act. *Id.* Thus the Court failed to address the takings issue as the petitioner had not exhausted all available remedies. *Id.*

Finally, *Preseault* is distinguishable from the instant case. At issue in *Preseault* was 16 U.S.C § 1247(d).[6] Conversely, 16 U.S.C. § 1248(c) is the

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[6] *Compare* 16 U.S.C, § 1247(d) *with* 16 U.S.C. § 1248(c). § 1247(d) states in relevant part:

> Consistent with the purpose of this Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for any purpose of any law or any rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified subdivision is prepared to assume full responsibility for management of such rights-of-way . . then the Commission . . . shall not permit abandonment.

16 U.S.C. § 1247(d). While § 1248(c) states:

> Abandoned railroad grants; retention of rights: Commencing upon October 4, 1988, any and all right, title,

(Continued on following page)

section at issue in the instant case. This is significant because under § 1247(d) no reversion or abandonment ever takes place prior to ROW being retained and employed as a trail. *See Preseault,* 494 U.S. at 7. Unlike § 1247(d), § 1248(c) pursuant to § 912 requires a judicial declaration of abandonment as a prerequisite to the United States' retention of its § 912 ROW reversionary interest. This difference seems to highlight the inapplicability of the reasoning in *Preseault* and subsequently *Hash* to the instant case.

CONCLUSION ON RAILROAD RIGHT-OF-WAY REVERSION

For the reasoning enumerated above, the Court concludes that the Government has met its burden in proving that it retains a reversionary interest in the Fox Park railroad ROW pursuant to 43 U.S.C. § 912, 16 U.S.C. § 1248(c), and previous decisions of the Tenth Circuit. However, this Court is aware that there is a split among the circuit courts. As the Trust points out, the Federal Circuit and the Federal Court

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> interest, and estate of the United States in all rights-of-way of the type described in section 912 of Title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

16 U.S.C. § 1248(c).

of Claims, under *Hash* and *Beres* held that the conversion from a railroad ROW to public trail as mandated under 16 U.S.C. § 1248(c) constituted a taking. The Trust's argument relies predominantly on this line of cases as support for its argument. However, these decisions are not consistent with the prevailing authority in this circuit. Moreover, the Court finds that *Preseault,* and subsequently *Hash,* are distinguishable from the instant case. In light of the controlling Tenth Circuit case law, the Government's Motion for Summary Judgment is **GRANTED** and title to the railroad ROW is quieted in the Government.

On a final note, should the Trust decide to pursue a takings claim, under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Federal Claims Court would have exclusive jurisdiction provided that the compensation sought is greater than $10,000.00.[7] With this in mind, any takings issues brought before this Court would be dismissed for want of subject matter jurisdiction. *See* 28 U.S.C. § 1491(a)(1); *Preseault,* 494 U.S. at 11-14.

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[7] 28 U.S.C. § 1346. The Little Tucker Act provides concurrent jurisdiction to the Federal District Courts for claims of $10,000.00 or less. *Id.*

APPLICABLE FACTS AND PARTIES' ARGUMENTS ON FOREST SERVICE ROAD COUNTERCLAIM

FACTUAL BACKGROUND

As stated *supra*, the predecessors of the Trust were granted "land with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants . . forever."[8] Prior to October 21, 1996, Marvin M. Brandt contacted the Laramie Ranger District of the Medicine Bow-Routt National Forest ("MBRNF") in

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[8] Patent No. 49-76-0031. The patent also contains the following excerpted provisions:

> EXCEPTING AND RESERVING TO THE UNITED STATES from the land granted a ROW thereon for ditches or canals constructed by the authority of the United States; and
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> RESERVING TO the United States, and its assigns, a ROW for the existing Platte Access Road No. 512 over and across Tract No. 37 . . approximately 420 feet [in length and] with a ROW width 10 feet to the left of the centerline and 20 feet to the right of the centerline.
>
> Provided, that if for a period of five years, the United States, or its assigns, shall cease to use the above roads, or any segment thereof, for the purposes reserved, or if at any time the Regional Forester determines that the roads, or any segment thereof, is no longer needed for the purposes reserved, the easement traversed thereby shall terminate. In the event of such nonuse or such determination by the Regional Forester, the Regional Forester shall furnish to the patentees or, their heirs or assigns, statement in recordable form evidencing termination.

Id.

Albany County, Wyoming, and requested that Forest Service Road ("FSR") 512 be closed through Fox Park, Wyoming for safety reasons.

On October 2, 1996, the Laramie Ranger District of the MBRNF published a Decision Memorandum closing FSR 512 from its junction with FSR 517 through Fox Park, Wyoming. Specifically, the Decision Memorandum provides that the Forest Service is "closing and obliterating roughly 0.2 miles of FSR 512 from the junction of FSR 512 and FSR 517 to the Fox Park Resort.[9] Subsequently, the Forest Service closed FSR 512 and opened Access Road 512-C in its place. Access Road 512-C runs west of Fox Park and joins with the remaining unclosed portion of FSR 512 to the north of the Trust's property. Since at least October 21, 1996, the 0.2 mile portion of FSR 512 has been gated and used as a private road. The Forest Service employees installed barricades preventing access to FSR 512 from FSR 517. Additionally, the Forest Service employees removed and graded the paved road surface and planted native grasses over the 0.2 miles of FSR 512 that crosses the Trust's property on November 1, 1996.

Each party has filed numerous briefs in support/opposition to the other party's motion for summary

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[9] *See* Exhibit 2. The Decision Memorandum also provides: "The Forest Service currently has an easement allowing access across the road. By implementing this proposal, the Forest Service would relinquish the easement and access would be provided on National Forest Service lands." *Id.*

judgment. Rather than go through each parties' arguments and counterarguments in serve-volley manner the Court has reorganized their arguments for the sake of clarity and brevity.

The parties rely on varying interpretations of the language in the patent which granted the Trust its property subject to the road easement. This disparity revolves around the express conditions for termination of the easement in the patent and the argument of whether these conditions have been triggered/ satisfied. The patent reads in relevant part:

> Provided, that if for a period of five years, the United States, or its assigns, shall cease to use the above roads, or any segment thereof, for the purposes reserved, or if at any time the regional Forester determines that the roads, or any segment thereof, is no longer needed for the purposes reserved, the easement traversed thereby shall terminate. In the event of such nonuse or such determination by the Regional Forester, the Regional Forester shall furnish to the patentees or, their heirs or assigns, a statement in recordable form evidencing termination.

Def.'s Statement of Undisputed Fact at Ex. 1. Both parties agree that the patent states two conditions for termination. These conditions are (1) nonuse of the road by the United States for a five-year period or (2) a determination by the Regional Forester that the road or a segment of it is no longer needed for the purposes reserved.

THE TRUST'S ARGUMENTS

CONDITION NUMBER 1:

The Trust contends that the first termination condition has been triggered and as a result the easement has terminated. The Trust claims that the Forest Service has not used FSR 512 since at least 1996 when it took steps to obliterate the 0.2 mile segment. Further, according to the Trust, upon removing the portion of FSR 512, the Forest Service instructed Marvin Brandt to install a gate at the south end of the road. At their behest, Brandt installed a gate and posted "No Trespassing" signage. He also enclosed the Trust's property with a "Buck-and-Pole" fence. In addition to claiming he acted upon the Forest Service's request, Brandt has also stated that to "the best of his knowledge, the Forest Service has not used that portion of [FSR] 512 that it closed through Fox Park, Wyoming." Decl. of Marvin Brandt (Ex. 3) at ¶ 17. The Trust also claims that the Forest Service has performed no maintenance on the road since 1996.

In light of the instructions Brandt received from the Forest Service combined with removal of the 0.2 mile segment of FSR 512 and the claim that Brandt has no knowledge of the presence of the Forest Service on the land since the time of the Decision Memorandum, the Trust argues that the United States has not used the easement in at least the required five-year period. Thus, the Trust claims the second

condition of the patent has been triggered and the easement has terminated.

In addition to the initial claim, the Trust argues that the words "any segment thereof," as contained in the patent indicate that when the Forest Service obliterated the 0.2 mile segment of FSR 512 it triggered the non-use condition for both FSR 512 and FSR 517.[10] The Trust asserts that if the Court should find that the easement for FSR 512 has terminated, based on the language of the patent, the easement for FSR 517 also must necessarily terminate. However, this contention was not included in the Trust's initial counterclaim.

CONDITION NUMBER 2:

On the issue of whether the second condition of the patent has been met, the Trust contends that the Decision Memorandum published by the District Ranger triggered the second condition in the patent and terminated the easement. The Trust relies on the language in the Decision Memorandum which expressly relinquished the easement. The memorandum stated: "The Laramie Ranger District . . . is proposing to re-route the transportation system in the vicinity

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[10] Def.'s Statement of Undisputed Fact at Ex. 1. The patent states in relevant part that "if for a period of five years, the United States . . . shall cease to use the above roads, or any segment thereof . . . the easement traversed thereby shall terminate." *Id.*

of Fox Park." Def.'s Statement of Undisputed Fact at Ex. 1. The memorandum also states: "The proposal includes closing and obliterating roughly 0.2 miles of FSR 512 from the junction of FSR 512 and FSR 517 to the Fox Park Resort." *Id.* "The purpose of the project is to reduce traffic concerns next to the Fox Park Resort . . . [and] [t]he proposed reroute would alleviate these problems." *Id.* "By implementing this proposal, the Forest Service would relinquish the easement and access would be provided on National Forest System lands." *Id.*

Additionally, the Trust argues the growth of the Forest Service since 1976 (the year the patent was issued) has required a delegation of authority from the Regional Forester to lower levels of authority. In light of this growth, the Trust argues the Decision Memorandum issued by the District Ranger and later implemented by the Forest Supervisor is within the scope of authority for these individuals.[11] Being within the scope of authority for these officials, their actions trigger the second condition of the patent.

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[11] *See* http://www.fs.fed.us/im/directives/fsh/7709.59/20.1-23.23.txt. The relevant part of the handbook states:

> The Chief, Regional Foresters, Experiment Station Directors, the Administrator of the Lake Tahoe Basin Management Unit, and Forest Supervisors are authorized to issue orders closing or restricting the use of any Forest development road (36 CFR 261.50). *See also* FSM 1013, which covers policy and responsibilities for issuance of such orders.

Id.

Thus, the Trust argues that the Decision Memorandum satisfies the patent's second termination condition and that the easement for FSR 512 (and apparently FSR 517) has been terminated.

WYOMING'S ABANDONMENT LAW APPLIES TO THE INSTANT CASE:

The Trust also argues that federal statutory law is inapplicable. It claims the Federal Property and Administrative Service Act of 1949, as triggered by the Government's reliance on *United States v. 434.00 Acres,* 792 F.2d at 1009-10, is inapplicable because the purpose of the act is inconsistent with the instant case. Specifically, the Trust points to the stated purpose of the act as "disposing of surplus property." 40 U.S.C. § 101. Under the act, property is defined as "any interest in property except [ ] land reserved or dedicated for national forest or national park purposes." 40 U.S.C. § 102(A)(ii). The Trust argues that since the land at issue was previously reserved for national forest purposes the Federal Property and Administrative Services Act does not apply. Further, the Trust argues that since no federal statute makes state law controlling in the instant action, federal common law should govern. However, since there has been little federal common law developed under these facts, Wyoming's law should prove instructive. *See United States v. Standard Oil Co. of Cal.,* 332 U.S. 301, 309-10 (1947).

Should this Court hold that neither condition has been satisfied, the Trust asserts that Wyoming law requires this Court to find that the easement has been abandoned. *See Mueller v. Hoblyn*, 887 P.2d 500 (Wyo. 1994). The Trust offers *Mueller* for the rule that abandonment of an easement requires intentional relinquishment indicated by conduct which discloses intent to surrender the right to use the land. *Id.* The Trust offers another Wyoming decision for the proposition that abandonment is a question of intent and conduct. *See Seven Lakes Development v. Maxson*, 144 P.3d 1239, 1248 (Wyo. 2006) (holding that the question of abandonment is one of fact, depending on intention and conduct). Under *Mueller*, Wyoming law states that "[e]asements may be terminated by abandonment." *Mueller*, 887 P.2d at 505. "Abandonment of easements requires an intentional relinquishment indicated by conduct which discloses the intention to surrender the right to use the land authorized by the easement." *Id.* The Trust argues that by its actions, the United States clearly indicated its intention to abandon the 0.2 mile segment of road. Further, the Trust argues this Court should adopt the standard set forth by the Supreme Court of Wyoming in *Mueller* and quiet title to FSR 512 through Fox Park in favor of the Trust.

Applying these rules to the instant case, the Trust claims that the Decision Memorandum is indicative of the Forest Service's intention to abandon the easement. Further, obliterating the 0.2 mile segment of FSR 512 and the installation of gates at

the behest of the Forest Service is conduct required to effectuate the abandonment of the easement. The Trust claims a simple syllogism: (1) if the Government has intent to abandon and does abandon the easement then the easement is terminated; (2) the United States expressed its intent to abandon and it did abandon the road easement; (3) therefore, the easement has been terminated by abandonment.

ESTOPPEL SHOULD BAR THE GOVERNMENT:

The Trust argues the Government should be estopped from asserting any claim to the FSR 512 against the Trust because the Trust relied on the Decision Memorandum and the subsequent actions of the Forest Service officials. The Trust cites a United States Supreme Court decision for the proposition that estoppel may be asserted against the United States. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51 (1984). The Trust points to this language of the United States Supreme Court:

> Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. While a hallmark of the doctrine is its flexible application, certain principles are tolerably clear . . . (b) to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired . . . thus, the party claiming the estoppel must have

> relied on its adversary's conduct in such a manner as to change his position for the worse.

Id. Applying this to the instant case, the Trust argues its estoppel claim is proven against the Government. For example, when the Forest Service requested that Brandt install locking gates at the south end of FSR 512, he obliged at his own expense. Also, once the Decision Memorandum was published, Brandt enclosed the entirety of the property in a "Buck and Pole" fence to keep out wandering livestock, again at his own expense. The Trust contends that these facts prove that it relied upon the actions of the Forest Service and to deny quieting title in favor of the Trust would be an injustice. Thus, estoppel should bar the Government's claim of a continued ownership of FSR 512.

CONCLUSION OF THE TRUST:

The Trust argues the Government has failed to provide a shred of evidence for its claim that the segment of road at issue has been in continuous use. Additionally, the Trust claims that the Decision Memorandum by the District Ranger and subsequent actions by the Forest Supervisor are equivalent to a decision by the Regional Forester. The Trust also argues that Mr. Brandt installed a fence around the property, a gate at the south end, etc., which indicates non-use. Further, should this Court find that the patent's conditions have not been triggered the Trust argues that Wyoming law compels a finding the

easement has been abandoned. Finally, if this Court refuses to adopt state law in this action, then the Government should be estopped from claiming any right or title to FSR 512.

THE GOVERNMENT'S ARGUMENTS

The Government argues against the Trust's second counterclaim asserting that neither condition set forth in the patent has been met. The Government also contends that before the easement reserved to the government can be extinguished at least one of these conditions must be satisfied. In essence, the Government argues "if neither condition has occurred the easement for the road through Fox Park is still extant." The Government rebuts the Trusts arguments that state law should apply. Similarly, the Government asserts the Trust has failed to meet its burden to prove an estoppel claim against the Government.

CONDITION NUMBER 1:

As to the first condition, non-use by the United States for five years, the Government contends that factual evidence suggests that the non-use condition has not occurred. The Government presents the affidavits of Jerry Schmidt, Pete Winters, and Curtiss Orde as proof of the continuous use of FSR 512 and to refute the testimony of Brandt that "to the best of his knowledge the Forest Service has not used" FSR 512.

Jerry Schmidt states that as Forest Supervisor he issued the travel order closing FSR 512 to public traffic. However, according to Schmidt, this order was not intended to prohibit federal personnel from using the road. Rather, the order was solely intended to exclude public access to FSR 512. Furthermore, Schmidt states that the Forest Service never abandoned the road. The Government argues that had the road been abandoned, the Forest Service would have no authority to close the road, i.e., you cannot close a road that you do not own.

Pete Winters, a long time Forest Service employee, states that he gained access to FSR 512 through the unlocked gate. He also states that in the last decade he has used FSR 512 to inspect the condition of the easements for Forest Service use and for encroachments. Finally, Curtiss Orde, another long term Forest Service employee, states that he knew of the planned re-route of FSR 512. He also claims that he has used FSR 512 for a number of reasons over the past ten years including law enforcement and livestock retrieval.

In essence, the Government claims that the testimony of these individuals show the intention and actions of the Forest Service are consistent with the retention of the easement for FSR 512. Moreover, the Government contends these individuals prove that the Forest Service has not ceased to use FSR 512 for the required five-year period and the non-use condition has not been met.

The Trust has argued that to abandon any "segment thereof" of FSR 512 abandons the entirety of the easement. The Government claims that in pursuing this argument the trust is advocating for a broad interpretation of the language contained in the patent. It argues that federal grants are to be strictly, not broadly, construed. *Delaware Nation v. Commonwealth of Pennsylvania,* 446 F.3d 410, 418 (3d Cir. 2006) (holding that where the terms of the patent are unambiguous there is no need to look beyond the four corners of the document and any ambiguities in a public land grant must be resolved strictly against the grantee and in favor of the Government). Accordingly, unless the Court finds the language of the patent ambiguous, under the cases cited, the grant will be narrowly construed.

Likewise, the Government claims there is no ground for the Trust to assert a claim over FSR 517 at this juncture. The Trust has not attempted to amend the complaint under Fed. R. Civ. P. 15. Further, FSR 517 was not at issue in the 1996 Decision Memorandum and has remained open for public access. *See Forman v. Davis,* 371 U.S. 178, 182 (1962) (holding that a district court may deny a motion to amend for reasons such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment."); *see also Smith v. Aztec Well Servicing Co.,* 462 F.3d 1274, 1285 (10th Cir. 2006) (holding

that denial to amend is appropriate solely on untimeliness where the party requesting the addition of new claims has no adequate explanation for delay). Under these Tenth Circuit decisions, the Government contends that the Trust's "failure to follow the proper procedure is another reason to prohibit a new claim at this juncture." Reply Br. of Pl. at 11 n. 2. The Government asks that any claim regarding FSR 517 should be barred.

The Government contends there is no material factual dispute regarding the usage of FSR 512. It asserts that in disputing the facts the Trust is merely attempting to fabricate a genuine issue of material fact to overcome the Government's motion for summary judgment. As an example of alleged overstatement, the Government points to the Trust's description that FSR 512 has been obliterated and is now non-existent The Government contends that the Forest Service only *altered* 0.1 mile of FSR 512 through Fox Park at the north end. A 1/10th mile segment is 528 feet in length whereas the whole segment of the road is 1825 feet. The altered section of the road is less than one third of the entire road and the remainder of the road remained useable and used. Further, the Government offers the statements of Casey Hull, another Forest Service Employee. According to Hull, FSR 512 is "still visible on the ground and if the wood barricades were removed, it could be easily re-opened and used." Hull Decl. at ¶¶ 5, 6. Finally, the Government offers photographs of the "obliterated" segment of FSR 512. The

Government contends these photos "belie [the Trust's] exaggerated assertions about the road, e.g., that for one to travel that segment would require an off-road adventure through the existing tall grasses and over, or around, the trees planted by the Forest Service." Reply Br. of Pl. at 21.

The Government rebuts the declaration of Marvin Brandt that he has no knowledge of the Forest Service using the FSR 512 since at least 1996 by pointing to the suspiciousness of such a self-interested statement. *See, e.g., Argo v. Blue Cross and Blue Shield of Kansas,* 452 F.3d 1193, 1199-2001 (10th Cir. 2006) (citing *Tavery v. United States,* 32 F.3d 1423, 1427 n. 4 (10th Cir. 1994) for the proposition that statements of mere belief in an affidavit must be disregarded by the Court under the personal knowledge standard and that a self-serving affidavit is insufficient to defeat summary judgment). For the reasons aforementioned, the United States claims that the Trust has failed to prove satisfaction of the first condition and that no genuine issue of material fact exists.

CONDITION NUMBER 2:

On the second termination condition, the Government argues that the Decision Memorandum issued by the District Ranger simply closed FSR 512 to the public and that it did not end the Forest Service's use of the road. First, the Government claims that the District Ranger did not have authority to

relinquish the easement. The language of the patent specifically states the only official with the authority to terminate the easement was the Regional Forester. *See United States v. California,* 332 U.S. 19 (1947) (holding government officers who do not have authority to dispose of property cannot do so). To bolster its argument, the Government offers the proposition that absent strict compliance with federal law there can be no disposition of property. *See U.S. v. 434.00 Acres,* 792 F.2d 1006 (11th Cir. 1986). Additionally, the Government contends if this Court finds the Decision Memorandum was an attempt to dispose of FSR 512, the Government cannot be bound by the Decision Memorandum because neither the District Ranger nor the Forest Supervisor had authority to dispose of the road. *Id.* Further, as the District Ranger is two tiers lower than the Regional Forester, his Decision Memorandum could only be a recommendation.

The Government also offers the affidavit of the Regional Forester, Rick D. Cables, to show that neither the District Ranger nor the Forest Supervisor had the authority to terminate the easement for FSR 512. *See* Decl. of Rick D. Cables ¶¶ 3, 4. Cables states:

> [T]here are no implied authorities within the Forest Service to dispose of any Federal real property interest.
>
> Where rights-of-way are reserved in the United States in federal land patents with provisions for termination by the Regional Forester when no longer needed for public purposes, those termination authorities have

> not been delegated to Forest Supervisors or District Rangers. A decision to terminate a right-of-way is reserved to the regional office so that broader policy implications and regional needs may be considered above the exigencies and conveniences of a local management situation.

Id. Applied to the instant case, the Government asserts that the unambiguous language of the patent reserves the right to terminate the easement to FSR 512 in the Regional Forester. Further, the Government claims that no such determination was ever made by the Regional Forester. *Id.*

The Government acknowledges the Forest Service handbook cited by the Trust which states that the Forest Supervisor has the authority to *close* or *restrict* the use of Forest Service roads.[12] However, the Government contends that an action by the Forest Supervisor to close a road does not equate to an action by the Regional Forester to terminate a real

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[12] http://www.fs.fed.us/im/directives/fsh/7709.59/20.1-23.23.txt. The relevant part of the handbook states:

> The Chief, Regional Foresters, Experiment Station Directors, the Administrator of the Lake Tahoe Basin Management Unit, and Forest Supervisors are authorized to issue orders closing or restricting the use of any Forest development road (36 CFR 261.50). *See also* FSM 1013, which covers policy and responsibilities for issuance of such orders.

Id.

property right reserved to the United States in a federal land patent.

WYOMING LAW DOES NOT ADVANCE THE TRUST'S POSITION:

The Government does not believe there is any reason to look beyond the four corners of the patent in deciding this case. According to the Government, the decision cited by the Trust necessarily requires this Court to find against the Trust. *See Mueller v. Hoblyn*, 887 P.2d 500 (Wyo. 1994). In *Mueller*, Mueller owned a single undivided tract of property that was subject to a road easement granted prior to his acquisition of the parcel. *Id.* at 502-03. Subsequently, the benefited parcel was subdivided and the divided parcels continued to use the road easement. *Id.* However, the road easement was improperly located. *Id.* When Hoblyn, the owner of the benefited land, approached Mueller about relocating the road, Mueller claimed that he had been using the easement for agricultural purposes and that he had installed a well on the easement. *Id.*

Mueller filed an action to quiet title to the easement on adverse possession grounds. *Id.* The district court held that only the section of the easement utilized for the well had been extinguished. *Id.* Mueller appealed and the Wyoming Supreme Court reversed the district court holding the adverse possession period (ten years in Wyoming) is not tolled until the holder of the easement seeks to use it. *Id.* at

504. Moreover, the *Mueller* court held the burden to show abandonment of a road easement is high and the evidence must be strong and convincing. *See id.* at 508-10. The Court held that in the absence of evidence of a permanent obstruction, such as a building, the drilling of the well and planting of crops were not inconsistent with the rights held by the owners of the dominant estates. *Id.* Thus, there was no portion of the easement that was terminated by adverse possession and the easement remained extant. *Id.*

In the instant case as in *Mueller,* there were no permanent structures blocking the route of the easement, only gate-like barriers. While the Trust relies on *Mueller* for the proposition that abandonment requires intent and conduct, the Government asserts that as in *Mueller,* the Trust's use of the easement has not been inconsistent with the Government's interest in the road. Thus, the Government contends that *Mueller* is inapplicable to the instant case. Moreover, applying *Mueller* to the instant case necessitates a ruling in favor of the Government because the obstructions to FSR 512 are not permanent.

THIS COURT SHOULD NOT APPLY ESTOPPEL AGAINST THE GOVERNMENT:

The Government contends the instant case is inappropriate for estoppel. The Government states that "equitable estoppel is an extraordinary remedy and [the United States] may not be estopped on the same terms as other litigants." Reply Br. of Pl. at 22 (citing

Board of Comm'rs v. Isaac, 18 F.3d 1492, 1498 (10th Cir. 1994)). Further, the Government offers that it is "far from clear that the Supreme Court would ever allow an estoppel against the government under any set circumstances." *See DePaolo v. United States ex rel. IRS (In re DePaolo),* 45 F.3d 373, 376 (10th Cir. 1995); *See also FDIC v. Hulsey,* 22 F.3d 1472, 1489 (10th Cir. 1994). The Government claims that in addition to the usual criteria of estoppel, applying estoppel to the Government requires a showing of affirmative misconduct or concealment of a material fact. *Sweeten v. U.S. Dep't of Agriculture,* 684 F.2d 679, 682 (10th Cir. 1982); *DePaolo,* 45 F.3d at 377. Moreover, affirmative misconduct is a high hurdle for the asserting party to overcome. *Id.*

Relying on these cases, the Government contends that there was no misconduct or concealment by the Forest Service. There being no legal obligation to close the road to public access, the Forest Service did so at the Trust's behest and at public expense. Further, the installation of the gate and fence around the Trust's property were not in reliance on the Government's actions. Rather, the Trust was simply taking full advantage of the opportunity it was given by the rescindable closure of FSR 512. Moreover, the Government claims the only error by the Forest Service in this matter was the District Ranger's erroneous belief that closing FSR 512 terminated the reserved easement. While this error was a mistaken belief, it was not misconduct or concealment of material facts. "Mere negligence, delay, or failure to follow agency

guidelines does not constitute affirmative misconduct." *DePaolo,* 45 F.3d at 377; *Isaac,* 18 F.3d at 1498. Finally, the Government asserts the plain language of the patent requires the Regional Forester to record the action in the county register. The Regional Forester never made such a recording. Thus, under the terms of the patent, there has never been a relinquishment of the easement through Fox Park.

CONCLUSION OF THE GOVERNMENT:

For the aforementioned reasons the Government argues that there are no genuine issues of material fact. Thus, summary judgment should be held in favor of the Government and title to the road should be quieted in the Government.

DISCUSSION ON THE COUNTERCLAIM

Several road issues are appropriate for summary judgment. These are the estoppel argument, the issue of whether state law should apply to the instant action, and whether the "any segment thereof" clause terminates the easements for FSR 512 and 517.

The Trust claims the Wyoming Supreme Court's decision in *Mueller* compels this Court to find the Government has shown the necessary intent and conduct to abandon the FSR 512 easement. However, a close reading indicates the Supreme Court of Wyoming required more than just a superficial relinquishment of an easement. *See Mueller,* 887 P.2d at

507. Under *Mueller,* abandonment requires the construction of permanent structures which obstruct the easement for enough time to satisfy the adverse possession period. *Id.* Further, the *Mueller* Court held the statutory period is not tolled until the easement holder asserts their right to the easement. *Id.*

Applied to the instant case, the construction of wooden barricades at one end of the FSR 512 and the installation of the gate at the south end of the road would not satisfy the permanent structure requirement of *Mueller.* Similarly, according to the affidavit of Hull, the supposed obliteration of the 0.2 mile segment of FSR 512 is easily remediated. Under these facts, this Court fails to see how the Trust has carried its burden. The Court agrees with the Government that to apply *Mueller* to this case necessarily requires a holding in its favor.

While the Trust's installation of the gate and the buck and pole fence are indicative of reliance on the actions of the Forest Service, the Court fails to see how it matters whether FSR 512 is deemed closed or whether the easement has terminated. Either way, the Trust retains the benefit of the closure. By closing the road to public access, the Forest Service has effectuated the increased safety result sought by the Trust in its initial letter to the District Ranger. Therefore, the Court fails to see how the Trust's reliance was in any way detrimental to it.

Furthermore, the Government cites controlling Tenth Circuit law that plainly states that the asserting

party must prove the Government engaged in behavior that qualifies as affirmative misconduct *or* concealment of a material fact. *See Swecten v. U.S. Dep't of Agriculture,* 684 F.2d 679, 682 (10th Cir. 1982); *DePaolo,* 45 F.3d at 377. The Government is correct in its reliance on this case law. The District Ranger's error does not meet the affirmative misconduct standard. The facts do not show any indication that an inference could be drawn to support an assertion of concealment of material facts.

Only one issue remains for analysis: whether either condition of the patent has been triggered terminating the easement. The Government fairly and succinctly stated these conditions in its brief as (1) non-use of the road by the United States for a five-year period *or* (2) a determination by the Regional Forester that the road or a segment of it is no longer needed for the purposes reserved. The Court will deal with the conditions in reverse order.

The second condition states that the easement terminates in the event the Regional Forester determines the road is no longer needed. The only evidence the Trust offers in support of its argument that the Decision Memorandum by the District Ranger satisfies this condition is a citation to an online Forest Service handbook which states that the Forest Supervisor and the District Ranger may close roads. However, the handbook fails to mention the authority of these officials to terminate easements. Absent the express authority to terminate the easement, the Trust has failed to meet its burden in proving the

Decision Memorandum qualifies as a relinquishment of the easement by the Regional Forester.

Conversely, the Government offers significant support for its assertion that the only person with authority to terminate the easement is the Regional Forester. For example, the Government offers the affidavit of the Rocky Mountain Regional Forester Rick Cables to clarify that where a federal land grant specifies the Regional Forester is the position with the authority to terminate real property rights held by the Government, there can be no delegation of that authority. The Government also offers case law in support of its position that only the Regional Forester has such authority. *See United States v. California,* 332 U.S. 19 (1947) (holding government officers who do not have authority to dispose of property cannot do so). Given the weight of the arguments offered by the Government, this Court agrees that the patent's second termination condition has not been met.

The first condition presents a more difficult problem to resolve. In order to prevail on the first condition the Trust must show that the Government has not used FSR 512 for a period of five years.[13] In support of its position the Trust offers the testimony of the trustee, Marvin Brandt, for the assertion that "to the best of his knowledge the Forest Service has not used" FSR 512. In response the Government submits the affidavits of several Forest Service employees

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[13] *See supra* note 8.

who describe their use of FSR 512 on multiple occasions.

If we rely on the testimony of Brandt and the Forest Service employees alone, it seems that there is a genuine issue of material fact making summary judgment inappropriate on the second counterclaim of the Trust. The lack of knowledge of Trustee Brandt fails to contradict the Forest Service affidavits of continued use of the closed sections of the road. However, as indicated *supra,* the Government offers Tenth Circuit case law, the gist of which is that a statement made by a self-interested party is insufficient to overcome a motion for summary judgment. *See, e.g., Argo v. Blue Cross and Blue Shield of Kansas,* 452 F.3d 1193, 1199-1201 (10th Cir. 2006) (holding that statements of mere belief in an affidavit must be disregarded by the Court under the personal knowledge standard and that a self-serving affidavit is insufficient to defeat summary judgment). Applied to the instant case, the statements of Marvin Brandt are clearly self-serving. When considered against the affidavits of the employees the conclusion that the Forest Service has not used the road easement fails.

CONCLUSION ON FSR 512

The Trust has failed to present a genuine issue of material fact on the second condition. However, the Trust has attempted to present an issue of material fact on the first (non-use) condition of the patent with Brandt's belief that the Government has not used

FSR 512 since 1996. In consideration of this statement alone, neither the Government nor the Trust has met its burden for summary judgment. However, since the issue of fact arises from the self-serving statement regarding Brandt's belief, under Tenth Circuit case law, this statement must be disregarded at the summary judgment stage and the Government must prevail on its motion. *Argo,* 452 F.3d at 1200 (citing *Tavery,* 32 F.3d at 1427 n. 4 (10th Cir. 1994)). Accordingly, under the Tenth Circuit's decision in *Argo,* it is therefore **ORDERED** that the Government's motion for summary judgment shall be, and is, **GRANTED** on the FSR 512 counterclaim.

Dated this 8th day of April, 2008.

/s/ Alan B. Johnson
ALAN B. JOHNSON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. WYOMING AND COLORADO RAILROAD COMPANY, INC., et al. Defendants.	)	No. 06-CV-0184J and Consolidated Case No. 06-CV-171J

JUDGMENT IN FAVOR OF THE UNITED STATES ON ITS CLAIMS AGAINST MARVIN M. BRANDT REVOCABLE TRUST AND MARVIN M. BRANDT, TRUSTEE AND ON THE FIRST AND SECOND COUNTERCLAIMS OF MARVIN M. BRANDT REVOCABLE TRUST AND MARVIN M. BRANDT, TRUSTEE

(Filed Mar. 2, 2009)

In accordance with the Court's Memorandum Opinion and Order entered on April 8, 2008, it is hereby ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That on or before January 15, 2004, defendant Wyoming and Colorado Railroad Company, Inc. ("WYCO"), abandoned its railroad right-of-way, being the same right-of-way granted under the General Railroad Right-of-Way Act of 1875 to the Laramie,

Hahn's Peak and Pacific Railroad Company, documented by the "Proof of Construction and Relinquishment of certain Grants accepted" certificate as per Bureau of Land Management File No. WYC04128 and as shown on the Second Amended Definite Location Plat of February 4, 1915 (hereinafter "the railroad right-of-way"), traversing the property owned by the Marvin M. Brandt Revocable Trust ("the Trust") and Marvin M. Brandt, Trustee ("Brandt") (the same land conveyed to Melvin M. Brandt and Lula M. Brandt by Patent Number 49-76-0031 dated February 18, 1976).

2. That WYCO has not conveyed any portion of the railroad right-of-way, where it traverses the above-described property of the Trust and Brandt, to a state, county, or municipality.

3. That the Court hereby declares and decrees that the railroad right-of-way, where it traverses the above-described property of the Trust and Brandt, has been abandoned by WYCO for all purposes including the National Trails System Improvements Act of 1988, 16 U.S.C. §1248(c), and the Abandoned Railroad Right-of-Way Act of 1922 (43 U.S.C. § 912).

4. That the United States retained a reversionary interest in the railroad right-of-way referenced in paragraph 1.

5. That as a result of the abandonment by WYCO, title to the railroad right-of-way is hereby vested and quieted in the United States, and the

United States is entitled to the quiet and peaceful use and possession of the railroad right-of-way.

6. That the interest hereby quieted and vested in the United States includes the right to construct and operate a recreational trail on the railroad right-of-way.

7. That title to the right-of-way for Forest Service Road 512, called Platte Access Road No. 512, which was reserved in Patent Number 49-76-0031, traversing the property owned by the Trust and Brandt, and the only road which is the subject of the Trust and Brandt's Second Counterclaim, is hereby quieted in the United States, and the United States is entitled to the quiet and peaceful use and possession of the right-of-way for Forest Service Road 512 for any and all National Forest and public purposes.

8. That fee title to the above-described property of the Trust and Brandt remains with the Trust and Brandt, subject to the rights of the United States in both the railroad right-of-way and the right-of-way for Forest Service Road 512 as described above.

DATED this 2d day of March, 2008.

/s/ Alan B. Johnson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. WYOMING AND COLORADO RAILROAD COMPANY, INC., et al. Defendants.	No. 06-CV-0184J and Consolidated Case No. 06-CV-171J

JUDGMENT AND DECREE ON CLAIMS OF THE UNITED STATES AGAINST THE WYOMING AND COLORADO RAILROAD COMPANY, INC., DECLARING ABANDONMENT OF THE RAILROAD RIGHT-OF-WAY

(Filed Mar. 2, 2009)

Upon the motion of the United States for entry of Judgment on its claims against the Wyoming and Colorado Railroad Company, Inc. (WYCO), and in accordance with the stipulation between the United States and WYCO, which was filed in this action on November 28, 2006, it is hereby ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That defendant Wyoming and Colorado Railroad Company, Inc. ("WYCO"), on or before December 31, 2003, abandoned its right-of-way, being the same right-of-way granted under the General Railroad Right-of-Way Act of 1875 to the Laramie, Hahn's

Peak and Pacific Railroad Company, documented by the "Proof of Construction and Relinquishment of certain Grants accepted" certificate as per Bureau of Land Management File No. WYC04128 and as shown on the Second Amended Definite Location Plat of February 4, 1915 (hereinafter "the right-of-way").

2. That WYCO did not convey any portion of the right-of-way to a state, county, or municipality within one year of such abandonment.

3. That WYCO has abandoned all rights, title and interests it may have had in the right-of-way, in accordance with 43 U.S.C. § 912.

DATED this 2d day of ~~January~~, March 2009.

/s/ Alan B. Johnson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. WYOMING AND COLORADO RAILROAD COMPANY, INC., et al., Defendants.	Case No. 06-CV-184-J & 06-CV-171-J

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS THE THIRD COUNTERCLAIM OF MARVIN M. BRANDT REVOCABLE TRUST AND MARVIN M. BRANDT WITHOUT PREJUDICE

AND

ORDER DENYING DEFENDANT MARVIN M. BRANDT REVOCABLE TRUST'S, MARVIN M. BRANDT, TRUSTEE, MOTION TO TRANSFER THE THIRD COUNTERCLAIM TO THE UNITED STATES COURT OF FEDERAL CLAIMS

(Filed Mar. 4, 2009)

This matter comes before the Court on Defendant Marvin M. Brandt Revocable Trust's, Marvin M. Brandt, Trustee, Motion to Transfer the Third Counterclaim

to the United States Court of Federal Claims and the Plaintiff's Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, and United States' Opposition to Transfer. The Court, having carefully reviewed the motions and the materials filed in support thereof and opposition thereto, and being fully advised in the premises, **FINDS** that the Plaintiffs Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt shall be **GRANTED** and the Defendant's Motion to Transfer the Third Counterclaim to the United States Court of Federal Claims shall be **DENIED** for the reasons stated below:

PROCEDURAL BACKGROUND

On July 14, 2006, Plaintiff United States of America filed its complaint for Declaratory Judgment of Abandonment and to Quiet Title seeking, *inter alia,* a declaratory judgment that the Wyoming and Colorado Railroad Company, Inc., abandoned a right-of-way lying within the Medicine Bow National Forest in the State of Wyoming and that all right, title, and interest in and to the right-of-way is vested in the United States.

On August 8, 2006, Defendant Marvin M. Brandt Revocable Trust, Marvin M. Brandt, Trustee (the "Trust"), filed an answer and counterclaims, essentially denying Plaintiff's claims and asserting that, *inter alia,* title to the right-of-way should be quieted

in its favor. In the alternative, the Trust included a counterclaim requesting compensation be awarded for the taking of the right-of-way.

On February 28, 2007, the Court ordered the case bifurcated, the quiet title action was to be decided first, and takings claims were stayed pending resolutions of the quiet title claims.

On April 8, 2008, the Court granted Plaintiff's Motion for Summary Judgment on Cross Claims and denied the Trust's Motion for Summary Judgment.

On April 18, 2008, the Trust filed a Motion to Transfer the Third Counterclaim to the United States Court of Federal Claims pursuant to 28 U.S.C. § 1631. On that same day, the United States filed a Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, without prejudice for lack of subject matter jurisdiction. It is these motions that the Court now considers:

ANALYSIS

The Trust contends that 28 U.S.C. § 1631 compels transfer of the third counterclaim. According to 28 U.S.C. § 1631:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court

> shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

If the Court finds that it is "in the interest of justice" to transfer the third counterclaim it has the discretion to do so. However, if no such interest is found, then the Court is empowered with the discretion to dismiss for want of subject matter jurisdiction. *Phillips v. Seiter*, 173 F.3d 609, 610-611 (7th Cir. 1998) (citing *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988)).

In this case, the Trust's argument is predicated upon the belief that injustice will result if the third counterclaim is barred in the United States Court of Federal Claims for violating the statute of limitations under 28 U.S.C. § 2501 (the statute of limitations for filing an action for a "take" against the United States is "six years after such claim first accrues"). However, the Trust is unable to indicate the date on which the statute of limitations began. Without such a date, the Trust cannot demonstrate that justice demands granting the Motion to Transfer. The phrase "in the interest of justice" is meant, among other things, to prevent dismissal of claims that would be time-barred upon filing in the correct court. *See Texas Peanut*

Farmers v. United States, 409 F.3d 1370, 1374-1375 (Fed. Cir. 2005). Without providing a date on which the statute of limitations began, the Trust is unable to effectively argue that its motion is in the interest of justice.

Upon motion of the United States, and good cause appearing, it is hereby

ORDERED that Defendant Marvin M. Brandt Revocable Trust's, Marvin M. Brandt, Trustee, Motion to Transfer the Third Counterclaim to the United States Court of Federal Claims is **DENIED**,

IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee, is **GRANTED**.

IT IS FINALLY ORDERED in accordance with the above rulings that the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee, is, and shall be **DISMISSED WITHOUT PREJUDICE**.

In light of the dismissal of the final claim before this Court, this case is now fully adjudicated before this Court and no matters remain outstanding.

Dated this 4th day of March, 2009.

/s/ Alan B. Johnson
ALAN B. JOHNSON
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Counter-Defendant-Appellee,

v.

MARVIN M. BRANDT, Trustee of the Marvin M. Brandt Revocable Trust, et al.,

Defendant-Counter-Claimants-Appellants,

and

DANIEL K. MCNIERNEY, et al.,

Defendant-Counter-Claimants,

and

WYOMING AND COLORADO RAILROAD COMPANY, INC., et al.,

Defendants.

RAILS TO TRAILS CONSERVANCY,

Amicus Curiae.

No. 09-8047

ORDER

(Filed Dec. 26, 2012)

Before **KELLY**, **O'BRIEN**, and **HOLMES**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

The General Railroad Right of Way Act of 1875, 18 Stat. 482-83 (1875), 43 U.S.C. §§ 934-939

"An act granting to railroads the right of way through the public lands of the United States."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Sec. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through

any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided,* That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve

months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided,* That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

Sec. 6. That Congress reserves the right at any time to alter, amend, or this act, or any part thereof.

Approved, March 3, 1875.

43 U.S.C. § 912

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this Act shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be

validated and confirmed by any Act of Congress; nor shall this Act affect any public highway now on said right of way: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

---

16 U.S.C. § 1248

* * *

(c) Abandoned railroad grants; retention of rights

Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of Title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

(d) Location, incorporation, and management

(1) All rights-of-way, or portions thereof, retained by the United States pursuant to subsection (c) of this section which are located within the boundaries of a conservation system unit or a National Forest shall be added to and incorporated within such unit or National Forest and managed in accordance with applicable provisions of law, including this chapter.

* * *

43 C.F.R. § 2842.1 (1976)

§ 2842.1. Nature of grant.

(a) *Generally.* A railroad company to which a right-of-way is granted does not secure a full and complete title to the land on which the right-of-way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company's right of use and possession. All persons settling on a tract of public land, to part of which right-of-way has attached, take the same subject to such right-of-way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right-of-way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of the Department of the Interior.

The United State of America
To all to whom these presents shall come, Greeting:

WHEREAS

Melvin M. Brandt and Lula M. Brandt in exchange for certain other lands conveyed to the United States, has selected and is entitled to a Land Patent pursuant to the Act of March 20, 1922, as amended, 16 U.S.C. 485 (1970), for the following described land:

Sixth Principal Meridian, Wyoming

T. 13 N., R. 78 W.,

Tract 37.

Containing 83.32 acres;

NOW KNOW YE, that there is, therefore, granted by the UNITED STATES unto the above named claimants the land above described; TO HAVE AND TO HOLD the said land with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimants, their successors and assigns, forever;

EXCEPTING AND RESERVING TO THE UNITED STATES from the land granted a right-of-way thereon for ditches or canals constructed by the authority of the United States; and

RESERVING TO the United States, and its assigns, a right-of-way for the existing Platte Access Road No. 512 over and across Tract No. 37, in Sections 21 and 22, T. 13 N., R. 78 W., 6th P.M.; beginning at a point from which Corner No. 7 of Tract 37,

T. 13 N., R. 78 W., 6th P.M. bears N. 13° 40' E., approximately 420 feet, thence, with a right-of-way width 10 feet to left of the centerline and 20 feet to the right of the centerline, traversing in a southwesterly direction approximately 105 feet to a point from which Corner No. 5 of said Tract No. 37 bears N. 73° 29' W., approximately 20 feet; and at which the right-of-way changes to 80 feet in width lying equally on either side of a centerline and continues traversing in a southwesterly direction approximately 1,720 feet to a point on the south boundary of the said Tract No. 37 from which Corner No. 3 of said Tract 37 bears N. 70° 03' W., approximately 825 feet and extending or shortening the side lines so as to terminate at the property line of said Tract 37, having a total length of approximately 1,825 feet and containing 3.30 acres, more or less; and

RESERVING TO the United States, and its assigns, a right-of-way for the existing Dry Park Road No. 517, over and across Tract 37 in Sections 21 and 22, T. 13 N., R. 78 W., 6th P.M. being approximately 80 feet in width, 40 feet to the left of the centerline, and to the extent the right-of-way delineated by the following described centerline lies within the foregoing described Tract 37 approximately 40 feet to the right of that centerline, and extending and shortening the sidelines so as to terminate at the property line. The centerline begins at a point on the north boundary of Tract 37, T. 13 N., R. 78 W., 6th P.M. between Corner No. 7 and Corner No. 8 of said Tract 37 from which said Corner No. 7 bears N. 73° 35' W.,

approximately 100 feet and traversing in a southwesterly direction approximately 440 feet to a point representing the terminus of road No. 517 and its junction with road No. 512, from which the Corner No. 7 of said Tract 37 bears N. 13° 40' E., approximately 420 feet containing 0.71 acres, more or less.

Provided, that if for a period of five years, the United States, or its assigns, shall cease to use the above roads, or any segment thereof, for the purposes reserved, or if at any time the Regional Forester determines that the roads, or any segment thereof, is no longer needed for the purposes reserved, the easement traversed thereby shall terminate. In the event of such nonuse or such determination by the Regional Forester, the Regional Forester shall furnish to the patentees or, their heirs or assigns, a statement in recordable form evidencing termination.

SUBJECT TO those rights for railroad purposes as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns by permit Cheyenne 04128 under the Act of March 3, 1875, 43 U.S.C. 934-939.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

[SEAL]

GIVEN under my hand, in Cheyenne, Wyoming the EIGHTEENTH day of FEBRUARY in the year of our Lord one thousand nine hundred and SEVENTY-SIX and of the Independence of the United States the two hundredth, and

By /s/ Harold G. Stinchcomb
Acting Chief, Branch of Lands
and Minerals Operations

Patent Number 49-76-0031

QUESTIONS AND ANSWERS ABOUT THE 1875 ACT AND OPINION M-37025.

ON NOVEMBER 4, 2011, THE SOLICITOR OF THE UNITED STATES DEPARTMENT OF THE INTERIOR ISSUED OPINION M-37025 WHICH PARTIALLY WITHDREW THE SOLICITOR'S 1989 OPINION M-36964 AND CLARIFIED THE SCOPE OF A RIGHT OF WAY ESTABLISHED UNDER THE GENERAL RAILROAD RIGHT OF WAY ACT OF MARCH 3, 1875 (1875 ACT). HERE ARE SOME QUESTIONS AND ANSWERS ABOUT THE 1875 ACT AND OPINION M-37025.

1. What is the General Railroad Right of Way Act of March 3, 1875?

The General Railroad Right of Way Act of March 3, 1875 (1875 Act) granted railroad companies a 100 foot right-of-way (ROW) on public land on either side of a railroad line subject to certain terms and conditions. Thousands of miles of 1875 Act ROWs are estimated to exist on public land in the western United States.

2. Were there other statutes that authorize the granting of ROWs on public land to railroad companies?

Yes. There were a number of acts pre-1871 that granted railroad companies ROWs. These pre-1871 acts were generally for specific companies or routes, and provided fee title to the lands over which the railroad was constructed, including to certain public

land on either side of a railroad line subject to certain terms and conditions.

3. Are the pre-1871 acts and the 1875 Act still in effect?

No. In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA). Title VII of FLPMA repealed the various railroad ROW statutes but recognized existing ROWs established under those statutes as valid existing rights.

4. What is an "M Opinion"?

An "M Opinion," which is short for "Memorandum Opinion," is a formal written opinion by the Solicitor that presents the official legal interpretation of the Department of the Interior on matters within the Department's jurisdiction. M Opinions are binding on all Department offices and officials and may be withdrawn, overruled, or modified only by the Solicitor, the Deputy Secretary, or the Secretary.

5. What did Opinion M-36964 do?

Opinion M-36964 was issued by the Solicitor in 1989 and arose in the context of MCI Communication's request to install a fiber optic line within three different railroad ROWs across BLM land held by the Southern Pacific Railroad Company pursuant to (i) the Act of July 27, 1866; (ii) the Act of March 3, 1871; and (iii) the 1875 Act. With respect to the pre-1871

ROWs, Opinion M-36964 concluded that a Southern Pacific held a fee interest and therefore could authorize any activity within those ROWs (including the installation of fiber optic line) so long as it did not interfere with railroad operations. With respect to the 1875 Act ROW, Opinion M-36964 concluded that Southern Pacific held an interest that was "tantamount" to a fee and thus could similarly undertake or authorize any activity within these ROWs (including the installation of fiber optic line) so long as it did not interfere with railroad operations.

6. What does Opinion M-37025 do relative to the 1875 Act?

Opinion M-37025 was issued by the Solicitor on November 4, 2011. It withdraws those portions of Opinion M-36964 regarding the 1875 Act based on the fact that those portions are inconsistent with a longstanding Supreme Court precedent – *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) – and two recent federal court decisions – *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) and *Home on the Range v. AT&T Corporation*, 386 F. Supp. 2d 999 (D. Ind. 2005) (the latter questioned the legal basis for Opinion M-36964's conclusion). Specifically, Opinion M-37025 rejects Opinion M-36964's conclusion that the 1875 Act is "tantamount" to a fee. Rather, Opinion M-37025 states that the scope of an 1875 Act ROW is limited to those activities that derive from or further a railroad purpose. As result, Opinion M-37025 activities that are not

related to railroad purposes are outside the scope of the ROW grant and that such activities require BLM authorization pursuant to applicable law. Approval of any such uses by the BLM will require coordination with the railroad to ensure such uses do not interfere with railroad operations within the ROW.

7. What does Opinion M-37025 do relative to the pre-1871 Acts?

Nothing. Opinion M-37025 specifically states that it does not alter the conclusions of Opinion M-36964 with respect to the pre-1871 Acts. Therefore, the conclusion of Opinion M-36964 that railroad companies possess a fee interest in these pre-1871 ROWs is unchanged.

8. What are examples of activities within a railroad ROW that derive from or further a railroad purpose?

Although each situation must be evaluated on a case by case basis, examples of activities within an 1875 Act ROW that may serve a railroad purpose include: telegraph, telephone and fiber optic lines that provide for both railroad and commercial communications; warehouses that provide for receipt of freight by the railroad while also providing other retail services; transmission lines that provide power to the rail line and commercially; and station grounds, maintenance yards, and related improvements.

9. What should the proponents of a new use within an 1875 Act ROW on BLM land do?

Proponents of new uses within an 1875 Act ROW should contact BLM for a determination of whether the proposed use serves a railroad purpose. As explained above, if BLM determines that a proposed use *does* serve a railroad purpose, BLM authorization is not required and the railroad company may undertake or authorize the use at its discretion, subject to any other applicable legal requirements. If, however, BLM determines that the proposed use *does not* serve a railroad purpose, BLM authorization is required and the proponent must submit an application to the agency for processing in accordance with applicable law, regulation and policy.

10. What actions, if any, will BLM undertake regarding uses that already exist within 1875 Act ROWs based on Opinion M-37025?

The BLM is currently developing guidance that addresses the relationship of Opinion M-37025 to existing uses within 1875 Act ROWs on BLM land and the actions, if any, that the agency should take to ensure compliance with the new Opinion.

11. Who should I contact for further information?

You may contact the BLM's Washington Office, Branch of Rights of Way at 202-912-7342 if you have further questions concerning the applicability of Opinion M-37025 to 1875 Act ROWs on BLM land.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1173

Supreme Court, U. S.
FILED
APR 2 5 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE CATO INSTITUTE AND THE NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Top Lawsuits Impacting the Title Industry, ALTA TITLE COUNSEL COMMITTEE, TITLE NEWS, vol. 89, no. 5 (May 2010) 9, 16

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is important to Cato because the Tenth Circuit's decision unsettles long-established property interests and allows the federal government to take property from individual owners without the just compensation required by the Fifth Amendment.

The National Association of Reversionary Property Owners is a Washington State non-profit 501(c)(3) educational foundation, whose primary purpose is to assist property owners in the education and defense of their property rights, particularly their ownership of

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, *amici curiae* provided counsel for all parties ten days notice of the filing of this brief, and all parties have consented to such filing.

property subject to railroad right-of-way easements.[2] Since its founding in 1989, the Association has assisted over ten thousand property owners and has been extensively involved in litigation concerning landowners' interest in the land subject to active and abandoned railroad rights-of-way easements. *See National Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998), and *amicus curiae* in, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) ("*Preseault I*").

This case is important to the Association because the Tenth Circuit's decision unsettles long-established property interests and clouds the title of many landowners whose property is (or was) encumbered by a railroad right-of-way easement established under the General Railroad Right-of-Way Act of 1875, 43 U.S.C.

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[2] We use the term "reversionary" as shorthand reference to a landowner's fee estate in land encumbered by an easement granting (in this case) a railroad a right-of-way to operate a railway line across a strip of the owner's land. "We note in passing that as a matter of traditional property law terminology, a termination of the [railroad] easements would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden." *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004). *See also Preseault v. United States*, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (en banc) (*Preseault II*) ("Instead of calling the property owner's retained interest a fee simple burdened by an easement, this alternative labels the property owner's retained interest following the creation of an easement as a 'reversion' in fee. Upon the termination, however achieved, of the easement, the 'reversion' is said to become fully possessory; it is sometimes loosely said that the estate 'reverts' to the owner.").

934-939 ("1875 Act"). And because the Tenth Circuit's split from the holding of the Seventh and Federal Circuits, resolution of title disputes will be more costly and time-consuming.

BACKGROUND

Marvin Brandt and his family own land in Wyoming, holding title to this land in a revocable trust. *United States v. Marvin M. Brandt Rev. Tr.*, 2008 WL 7185272 at *1 (D. Wyo. April 8, 2008). The Brandt family bought this property from landowners who traced their title to a land patent the United States issued homesteaders in 1976.[3] *Id.* at *2.

In 1908, when the federal government still owned the land, "the Laramie, Hahn's Peak and Pacific Railroad Company was granted a right-of-way for railroad purposes through the public lands of the United States under the [1875 Act]." *Id.* at *2. The right-of-way was two hundred feet wide and sixty-six miles long. This right-of-way encumbered 1,600 acres of land, including property now owned by the Brandt family.[4]

The 1976 land patent issued to a homestead patentee provided the land was "subject to those rights for railroad purposes as have been granted to the

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[3] The land patent issued February 18, 1976, pursuant to 16 U.S.C. § 485 for 83.32 acres of land. *Brandt*, 2008 WL 7185272 at *2.

[4] Sixty-six miles multiplied by 5,280 feet per mile by 200 feet in width is 69,696,000 square feet, which is 1,600 acres. One U.S. Survey Acre contains 43,560 square feet.

Laramie Hahn's Peak & Pacific Railroad Company, its successors or assigns...under the [1875 Act]." *United States v. Brandt*, 496 Fed. Appx. 822, 824 (10th Cir. 2012) ("*Brandt I*").[5] The land patent contains no provision by which the United States reserved any interest in the land encumbered by the railroad easement. A quarter-century after the land was patented to homesteaders, the railroad abandoned the right-of-way.[6]

In *Great Northern Railway Co. v. United States*, 315 U.S. 262, 271 (1942), this Court explained:

> The Act of March 3, 1875, from which [the Railroad's] rights stem, clearly grants only an easement, and not a fee. Section 1 indicates that the right is one of passage, since it grants 'the,' not a, 'right of way through the public lands of the United States.' Section 2 adds to the conclusion that the right granted is one of use and occupancy only, rather than the land itself....'

The Railroad, thus, "has only an easement in its rights of way acquired under the Act of 1875." *Id.* at 277.

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[5] *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013) ("*Brandt II*") is discussed below.

[6] The Wyoming-Colorado Railroad Company was the successor to the Laramie, Hahn's Peak & Pacific Railroad Company. *Brandt*, 2008 WL 7185272 at *2. In May 2001, the Wyoming-Colorado Railroad Company filed a Notice of Intent to Abandon Rail Service with the Surface Transportation Board ("STB"). *Id.*

When the government patents land to private owners–absent an express provision to the contrary–the private owner obtains the entirety of that interest the government held–the fee simple estate. The private owners' interest is limited, if at all, by (a) a prior grant of an interest in the land which the government made to a different entity; or, (b) an interest the government itself expressly reserved in the land patent. *See, e.g.*, *Boesche v. Udall*, 373 U.S. 472, 477 (1963) (a land patent "divests the government of title"), *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 49 n.9 (1983) (holding that once the land patent issued, the government had no recourse, even when the patent was erroneously issued), and *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 329, 331 (1924) ("it is true as a general rule, that when...entry is made and certificate given, the land covered ceased to be a part of the public lands...[and] all title and control of the land passes from the United States"). *See also Witherspoon v. Duncan*, 71 U.S. 210, 219 (1866), and *United States v. Schurz*, 102 U.S. 378, 397 (1880).

In neither the 1875 Act nor the 1976 land patent did the government reserve any interest in that strip of land encumbered by the right-of-way easement granted the railroad. Thus, when the government issued the 1976 land patent conveying this property to private owners (the Brandt family's predecessors in title), these private owners took title to this land subject only to that easement the railroad then held to operate a railway line across this strip of land. And, in 2001, when the railroad abandoned this railway line, the easement terminated, and the Brandt family—as owner of the underlying fee estate—owned their land unencumbered by any easement.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision in *Brandt I* is inconsistent with this Court's 1875 Act jurisprudence and is directly contrary to the holding of the Federal and Seventh Circuits. *Brandt I* upsets long-established title to potentially millions of acres of land owned by tens of thousands of landowners. *Brandt I* will result in decades of costly litigation with inconsistent outcomes depending upon the circuit with jurisdiction. For these reasons, this Court should grant the Brandts' petition for review.

ARGUMENT

I. THE TENTH CIRCUIT SPLIT FROM THE FEDERAL AND SEVENTH CIRCUITS.

Every Circuit to consider the issue—other than the Tenth Circuit—has held the federal government did not retain any "implied" interest in land encumbered by a railroad right-of-way easement established under the 1875 Act.

A. The Federal Circuit's *Hash v. United States* decision in favor of the reversionary landowner.

The Federal Circuit considered this question in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (Newman, J.). *Hash* involved an 1875 Act right-of-way across land of "approximately two hundred Idaho landowners." *Id.* at 1310. The Federal Circuit stated:

> The primary issue is whether the...landowner owns the estate underlying the Railroad right-of-way, or whether the underlying estate never left its ownership by the United States, or whether the estate was deeded in fee to the Railroad.

Id. at 1312. After reviewing this Court's jurisprudence, the Federal Circuit concluded:

> The rights acquired by the homestead patentee are governed by the Act of 1875, which granted to the railroad the right to traverse the land and build stations and other railway structures, and provided that disposition of the land would be subject to the right-of-way. The district court erred in holding that the United States retained the reversionary interest to the land underlying these rights-of-way after disposing of the land grant patent under the Homestead Act.

Id. at 1318.

The Federal Circuit reached this holding by expressly relying upon this Court's decisions in *Great Northern*, *Boesche*, *Swendig*, *Watt*, *Witherspoon*, and *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979), among other cases.

The Federal Circuit noted this Court's policy of "consistently preserv[ing] the integrity of the land grant patent, in its review and application of the statutes before and after the 1875 Act." *Hash*, 403 F.3d at 1315. The subordinate Court of Federal Claims ("CFC") has followed the Federal Circuit. *See, e.g.*, *Beres v. United States*, 64 Fed. Cl. 403, 425-28 (2005).

B. The Seventh Circuit's *Samuel C. Johnson* decision in favor of the reversionary landowner.

The Seventh Circuit reached the same conclusion. In *Samuel C. Johnson 1988 Trust v. Bayfield County*, 649 F.3d 799, 803 (7th Cir. 2011) (Posner, J.), the court ruled that the railroad held only an easement, and when the government patented the land to a private owner, the private owner took full fee simple ownership of the property. "[T]ermination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement." *Id.* (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.4, comments a, c, f (2000), and numerous federal acts and decrees).

The Seventh Circuit also considered the Tenth Circuit's contrary opinion in *Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028, 1031 (10th Cir. 1994), and the scant authority (a district court decision and a law review article) upon which the Tenth Circuit premised its decision. The Seventh Circuit concluded that the Federal Circuit's decision in *Hash* "make[s] better sense than [the Tenth Circuit's decision in] *Marshall*...." *Samuel C. Johnson*, 649 F.3d at 803. And, the Seventh Circuit said, *Hash* was "supported by the characterization...of the rights of way created under the 1875 Act as 'easements'" by this Court in *Great Northern*. *Id.*

Following this Court's analysis in *Great Northern*, Judge Posner continued:

> The [1875] Act does not hint at a reversionary interest, and who searching the chain of title of a lot never owned by a railroad would suspect a lurking governmental right so unsettling to the security of private property rights?

Id.

The Seventh Circuit then reversed the district court's decision, which wrongly held the federal government retained an "implied" reversionary interest in land subject to 1875 Act railroad rights-of-way.[7]

In 2009, before the Seventh Circuit reversed the district court's decision, the American Land Title Association named the district court's decision one of the six most important court decisions with "significant ramifications on the title insurance industry." *See Top Lawsuits Impacting the Title Industry*, ALTA TITLE COUNSEL COMMITTEE, TITLE NEWS, vol. 89, no. 5 (May 2010), p. 10. The land title association did so because "many title examiners have relied on the acts of a U.S. agency and the direct acts of the U.S. to insure titles free of the interest of the U.S. and those claiming under them. [The district court's decision] could prove that reliance misplaced." *Id.* at 13.

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[7] In *Samuel C. Johnson*, the federal government had supposedly conveyed this implied reversionary interest to the county for a snowmobile trail.

C. The Tenth Circuit ruled to the contrary in *Brandt I*.

The Tenth Circuit explained, "[t]hough we recognize that the Seventh Circuit, the Federal Circuit and the Court of Federal Claims have concluded that the United States did not retain any reversionary interest in these railroad rights-of-way, we are bound by our precedent." *Brandt I*, 496 Fed. Appx. at 824-25. The Tenth Circuit then held, on the basis of its prior decision in *Marshall*, that "the United States retained an *implied* reversionary interest" in land. *Id.* at 824. (emphasis supplied). The Tenth Circuit concluded that this "implied" reversionary interest arose by reason of federal legislation enacted *after* the land patent, to wit, the 1988 modification to 16 U.S.C. § 1248(c). *Id.* at 824-25.

The Tenth Circuit acknowledged its holding was directly contrary to decisions of the Federal Circuit, the Seventh Circuit, and the CFC. *Brandt I*, 496 Fed. Appx. at 825. The Tenth Circuit rejected the view of these other courts, looking instead to *Marshall*, which was premised on a single 1985 opinion by a district court judge *and a law review article*:

> Relying upon *Idaho v. Oregon Short Line R.R.*, 617 F. Supp 207 (D. Idaho 1985), we concluded that the United States retained an implied reversionary interest. *Marshall* at 1032.

Id. The Tenth Circuit's deference to a district court's 1985 decision—instead of the well-reasoned unanimous opinions of two sister circuits—is more than passing strange.

Even odder was the Tenth Circuit's reliance on a law review article: Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's '1871 Shift,'* 82 U. COLO. L. REV. 85, 150-64 (2011). *See Brandt I*, 496 Fed. Appx. at 825. Mr. Roberts is neither a historian nor scholar; he is a lawyer with the U.S. Attorney's office. *See* Roberts, *Legal History* at n.a1.

The Tenth Circuit never explained why an article written by a government lawyer is more compelling authority than unanimous opinions authored by Judge Newman of the Federal Circuit and Judge Posner of the Seventh Circuit.

Further, Mr. Robert's law review article, on which the Tenth Circuit relies, is premised on a demonstrably false historical premise. As his title suggests, Mr. Roberts contends Congress's 1870s shift in policy concerning railroad land grants is a "myth." Roberts, U. COLO. L. REV. at 85. But, if a "myth," it is a "myth" embraced and affirmed by extraordinarily credible authorities—including this Court.

In *Great Northern*, this Court explained the 1875 Act was the result of a "sharp change in Congressional policy with respect to railroad grants after 1871." 315 U.S. at 275.

Before 1871, Congress made generous land grants to individual railroad companies. Congress wanted to encourage railroads to build a transcontinental railway line and provided the railroads land for a right-of-way as well as fee title to alternating tracts of land the railroad could sell to finance construction of the

railroad. This Court described the railroad's interest in the right-of-way land, upon which it built railway lines under these pre-1871 grants, as a "limited fee." *See, e.g., Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, 271 (1903).

This federal largesse to powerful and politically connected railroad interests resulted in scandal and public outrage. The most notorious was the Credit Mobilier Scandal. Congress responded by dramatically changing its land grant policy.

This Court explained Congress's 1871 "shift" in policy:

> Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. This policy incurred great public disfavor which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:[8]
>
> After 1871 outright grants of public lands to private railroad companies seem to have been discontinued. But, to encourage development of

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[8] "Resolved, that in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law. Cong. Globe, 42d Cong., 2d Sess., 1585 (1872)."

> the Western vastnesses, Congress had to grant rights to lay track across the public domain....

In the early 1870s, Congress initially passed separate "special acts" for each grant of a right-of-way to a railroad. This Court ruled these acts granted the railroad a right-of-way easement, not title to the land itself. *Id* at 274. But passing special legislation for each railroad right-of-way was burdensome, so Congress passed the 1875 Act which was a "general right of way statute" that applied to all railroad rights-of-way across land then owned by the federal government.

This Court held the 1875 Act granted the railroad only a "right of passage" across the land:

> Since *it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871*, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches.... [Section 4] *strongly indicates that Congress was carrying into effect its changed policy* regarding railroad grants.

Great Northern, 315 U.S. at 273-75 (footnotes omitted) (emphasis supplied).[9]

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[9] *See also* James W. Ely, Jr., RAILROADS AND AMERICAN LAW, University Press of Kansas (2001), pp. 51-64 ("As a consequence [of scandals such as Credit Mobilier], Congress began to shift priorities with respect to the transcontinental project.").

Importantly, this Court also noted the animating objective underlying Congress's shift in policy was that "*public lands should be held for the purpose of securing homesteads to actual settlers.*" (*See supra* note 7.)

Thus, in the 1870s there was a "sharp change in Congressional policy with respect to railroad grants," this new policy was intended to hold public lands "for the purpose of securing homesteads to actual settlers," and the 1875 Act was adopted as part of this new congressional policy. The property interests of the railroad, the federal government, and the homesteaders who actually settled the land must be determined consistent with this policy.

The Tenth Circuit, however, relying on a law review article that called "the sharp change in Congressional policy" a "myth," broke with the Seventh and Federal Circuits. Instead, the Tenth Circuit found that the federal government retained an "implied" interest in the land patented to homesteaders which had been encumbered by an 1875 Act railroad right-of-way. This was so, the Tenth Circuit ruled, even though the land patent itself did not contain any provision by which the federal government retained an interest to this land.

The Brandt family requested the Tenth Circuit to rehear this issue *en banc*. The Tenth Circuit denied rehearing. *See* Order of December 26, 2012, *United States v. Brandt*, No. 09-8047, Doc. No. 01018973423 (10th Cir. 2012).

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT BY REVERSING *BRANDT I*.

A. *Brandt I* undermines this Court's interest in the "special need for certainty and predictability where land titles are concerned."

In *Leo Sheep*, 440 U.S. at 687-88 (Rehnquist, J.), this Court directed lower courts to recognize "the special need for certainty and predictability where land titles are concerned" and be "unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation."

A citizen's right to be secure in ownership of their property is one of the primary objects for which the national government was formed.[10] In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (Stewart, J.), this Court observed, "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights....That rights in property are basic civil rights has long been recognized."

The Tenth Circuit's decision in *Brandt I* is exactly what this Court admonished lower courts to avoid in *Leo Sheep*. It is not just that *Brandt I* held the government retained an "implied" reversionary interest in land subject to the 1875 Act. Even worse, the Tenth

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[10] *See* James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT–A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS, 2d ed., Oxford University Press (1998).

Circuit held this was so because of legislation Congress passed decades *after* the property had been patented to private owners.

When a district court reached a similar holding in *Samuel C. Johnson*, the American Land Title Association named the case one of the six most important lawsuits with ramifications for the land title industry. ALTA TITLE COUNSEL COMMITTEE, *supra* at 9. They did so because, should the United States be found to have retained an "implied" interest in land underlying 1875 Act railroad rights-of-way, it was contrary to how land titles had been insured. *Id.* at 13. Title examiners "insured titles free of the interest of the U.S. and those claiming under the U.S [and federal agencies]." *Id.* The district court decision in *Samuel C. Johnson*, like the Tenth Circuit in *Brandt I*, unsettled the reliance title examiners placed upon land patents involving property encumbered by a 1875 Act railroad right-of-way.

As Judge Posner noted in *Samuel C. Johnson*, the 1875 Act did not provide even a "hint" by which an owner "would suspect a lurking governmental right so unsettling to the security of private property rights." 649 F.3d at 803. The Tenth Circuit's opinion is especially "unsettling" because it retroactively redefines property interests granted in a 1976 land patent on the basis of a 1988 revision to a different federal statute.

How many acres of privately-owned land are encumbered by railroad rights-of-way established under the 1875 Act that have been (or will be)

abandoned is difficult to determine, but it is no small number. In *Preseault I*, this Court noted:

> In 1920, the Nation's railway system reached its peak of 272,000 miles; today only about 141,000 miles are in use, and experts predict that 3,000 miles will be abandoned every year through the end of this century.[11]

494 U.S. at 1.

The Library of Congress reports:

> [B]eginning in the early 1870s, railroad construction in the United States increased dramatically. Prior to 1871, approximately 45,000 miles of track had been laid. Between 1871 and 1900, another 170,000 miles were added to the nation's growing railroad system.[12]

During the same time railroads were expanding westward across public and private land, much of the public land was being patented to private owners under the Homestead Act of 1862, 12 Stat. 392, codified at 43 U.S.C. § 161 (repealed, 90 Stat. 2787 (1976)). The

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[11] Citing *Comment, Rails to Trails: Converting America's Abandoned Railroads into Nature Trails*, 22 AKRON L. REV. 645 (1989)); *see also* 102 *ICC Ann. Rep.* 44-45 (1988); 101 *ICC Ann. Rep.* 37-38 (1987).

[12] Library of Congress, *Rise of Industrial America, 1876-1900: Railroads in the Late Nineteenth Century*, AMERICAN MEMORY (available at: http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/railroad/)

Bureau of Land Management ("BLM") reported a total of 4 million land claims were filed, 270 million acres were transferred to private ownership, including 45 percent of the entire State of Nebraska.[13] The BLM also said "thousands of miles of 1875 Act [rights-of-way] are estimated to exist on public land in the western United States."[14]

These historical statistics suggest millions of acres of privately-owned land and tens of thousands of individual landowners' property may be encumbered by a railroad right-of-way established under the 1875 Act. Whether the United States does, or does not, hold an "implied" reversionary interest in this land is, thus, a matter of great significance to these owners and the United States.

B. *Brandt I* creates a dilemma because it is directly contrary to how the Court of Federal Claims would rule following *Hash* and *Brandt II*.

F. Hodge O'Neal, former Dean of Washington University Law School, was fond of the story about the older lawyer advising a young lawyer to be wary of the "peculiarities and inequities of the law:"

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[13] Mary Apple, *BLM Commemorates Homestead Act*, U.S. DEPT. OF THE INTERIOR, QUARTERLY STEWARD (Winter 2001) (available at: http://www.blm.gov/mt/st/en/info/newsroom/steward/11winter/pxburn.html)

[14] BLM, INTERIM GUIDANCE RELATING TO THE SCOPE OF A RAILROAD'S AUTHORITY TO APPROVE USES WITHIN RAILROAD RIGHTS-OF-WAY, (Dec. 2, 2011), attachment p. 1.

> The young lawyer said, "Why do you always tell me about the 'peculiarities and inequities of the law'?" The older lawyer said, "Well, fifteen years ago I was right at the top of the profession. I had plenty of clients, they were paying good fees, I had a wonderful family, I had a beautiful blonde secretary who could take shorthand, and all of a sudden the whole thing crumbled around my ears. My wife brought a suit for divorce on the grounds that I was impotent. My secretary brought a paternity action claiming I was the father of her child. And because of the peculiarities and inequities of the law I lost both cases."

F. Hodge O'Neal, *Proceedings*, 43 NEB. L. REV. 410, 422 (1963-64).

Brandt I invites just such a "peculiar and inequitable" outcome; here is why.

Brandt I began as a quiet title case the United States brought against the Brandt family. The Brandt family responded by disputing the government's claim and bringing a Fifth Amendment taking claim. The Tucker Act, 28 U.S.C. § 1491(a)(1), however, vests exclusive jurisdiction for such a taking claim with the CFC.[15]

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[15] The "Little Tucker Act" allows a federal district court to hear claims for less than $10,000. 28 U.S.C. § 1346(a)(2). Any appeal from the district court is lodged with the Federal Circuit. 28 U.S.C. § 1295(a)(2).

The Brandt family pursued their taking claim in the CFC. The CFC dismissed the case as barred under 28 U.S.C. § 1500 and this Court's decision in *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011). The Federal Circuit reversed. *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013) ("*Brandt II*"). The Brandts' taking claim is now remanded to the CFC for decision on the merits.

The dilemma arises because the CFC is bound to follow *Hash*, in which the Federal Circuit held the United States did not retain any "implied" reversionary interest in land encumbered by railroad rights-of-way established under the 1875 Act. Thus, under *Hash*, the Brandt family—not the government—owns the land. In *Brandt I*, however, the Tenth Circuit held the government—not the Brandt family—owns the land because the United States retained an "implied" reversionary interest under the 1875 Act.

This Court should grant the Brandts' petition to review the Tenth Circuit's decision and prevent *Brandt I* from giving rise to such an idiosyncratic result.

C. If left to stand, *Brandt I* will make resolving landowners' Trails Act taking claims much more costly and time-consuming.

More than a quarter-century ago, Congress adopted § 1247(d) of the National Trails System Improvement Act.[16] The "Trails Act" allows the STB to take an otherwise abandoned railroad right-of-way easement and use the land for public recreation and so-called "rail-banking." Because these new and different uses of the land are beyond the scope of the original easement, this is a taking of the owner's property. *See Preseault I*, 494 U.S. at 12; *Preseault II*, 100 F.3d at 1525; *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004); *National Wildlife Federation v. I.C.C.*, 850 F.2d 694, 708 (D.C. Cir. 1988); and *Ladd v. United States*, 630 F.3d 1015, 1023-24 (Fed. Cir. 2010).

In *Preseault I*, this Court held:

> [R]ail-to-trail conversions giving rise to just compensation claims are clearly authorized by [§1247(d)]. Although Congress did not explicitly promise to pay for any takings, we have always assumed that the Tucker Act is an "implie[d] promis[e]" to pay just compensation which individual laws need not reiterate.

494 U.S. at 13.

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[16] Pub. L. No. 98-11, 97 Stat. 42, National Trails System Improvement Act of 1998, codified, as amended, at 16 U.S.C. § 1248, *et. seq.* (2006).

Because owners could be compensated by bringing an inverse condemnation action in the CFC, this Court sustained the constitutionality of the Trails Act. But during the two decades since *Preseault I*, landowners seeking to vindicate their Fifth Amendment right to "just compensation," have confronted almost a decade of costly litigation.

More than fifty Trails Act taking cases are now pending in the CFC and federal district courts. Each of these cases includes the consolidated claims of many owners along the abandoned right-of-way easement subject to the STB's order. Many of these cases involve claims of several hundred owners. While it is impossible to state with certainty the total number of landowners whose claims are now pending, it is almost certainly more than ten thousand. And the STB continues to issue orders invoking § 1247(d), taking property from owners who have yet to seek compensation. Many of these owners' claims, like *Hash* and *Beres*, involve rights-of-way established under the 1875 Act.

The United States has chosen to respond to Trails Act taking claims by mounting an aggressive challenge to any landowner seeking compensation. The government requires landowners to run a gauntlet of litigation.[17] The government concedes little, litigates

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[17] *See* M. Hearne, *et al.*, *The Trails Act: Railroading Property Owners and Taxpayers For More Than a Quarter Century*, 45 REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 115, 118 (Spring 2010).

every point, and recycles the same losing arguments in each case.

For example, the government repeatedly made, and lost, its "railbanking is a railroad" argument. The government claims because a new railroad line could possibly be built across this land in the future, the land is now still being used for a "railroad." The Federal Circuit rejected this argument in *Preseault II*:

> As to the latter, otherwise known as railbanking, . . . [t]he vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation.

100 F.3d at 1554 (Rader, J., concurring). The Federal Circuit rejected this argument a second time in *Toews*, 376 F.3d at 1376.

Though rejected by the Federal Circuit *en banc*, and a second time in *Toews*, the government continues to use this same argument in subsequent Trails Act cases. Not surprisingly, the CFC repeatedly rejects the argument. The government has lost this argument in more than twenty consecutive cases.[18]

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[18] *See, e.g.*, *Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000); *Biery v. United States*, 99 Fed. Cl. 565 (2011); *Rogers v. United States*, 90 Fed. Cl. 418 (2009); *Farmers Co-op. Co. v. United States*, 98 Fed. Cl. 797 (2011); *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483 (2011); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 146 (2011); *Anna F. Nordhus Trust v. United States*, 98 Fed. Cl.

After losing all of these (and other) cases on liability, the government recast this argument as its "encumbered before taken" argument, now made in the valuation stage. Even though the landowner would have enjoyed unencumbered title and exclusive possession of their property when the railroad easement terminates, the government claims the land should be valued by pretending it is still encumbered by a railroad easement. Every court to consider the argument has rejected it.[19] Yet the government continues to make it!

As the Federal Circuit recently observed, the Justice Department's defense of Trails Act cases has been "puzzling," not only by "foregoing the opportunity to minimize the waste both of its own and plaintiffs' litigation resources, not to mention that of scarce

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331 (2011); *Macy Elevator v. United States*, 97 Fed. Cl. 708, 730 (2011); *Thompson v. United States*, 101 Fed. Cl. 416 (2011); *Hodges v. United States*, 101 Fed. Cl. 549 (2011); *Rhutasel v. United States*, 2012 WL 2373253 (Fed. Cl. June 22, 2012); *Ingram v. United States*, 2012 WL 1943128 (Fed. Cl. May 24, 2012).

[19] *See, e.g.*, *Ladd*, 630 F.3d at 1023, 1025; *Navajo Nation v. United States*, 631 F.3d 1268, 1275 (Fed. Cir. 2011); *Ybanez v. United States*, 98 Fed. Cl. 659 (2011), *Ybanez v. United States*, 102 Fed. Cl. 82 (2011); *Rogers v. United States*, 101 Fed. Cl. 287 (2011); *Raulerson v. United States*, 99 Fed. Cl. 9 (2011); *Ingram*, 2012 WL 1943128; *Macy Elevator, Inc. v. United States*, 2012 WL 2368523 (Fed. Cl. June 21, 2012); *Howard v. United States*, 2012 WL 3554451 (Fed. Cl. Aug. 16, 2012); *Whispell v. United States*, 2012 WL 3591096 (Fed. Cl. Aug. 22, 2012); *Anna F. Nordhus Family Trust v. United States*, 2012 WL 2989967, *3 (Fed. Cl. July 20, 2012); *Adkins v. United States*, Case No. 09-503L, Opinion, Doc. No. 59 (July 10, 2012), p. 23; *Ladd v. United States*, 2013 WL 1069148, *4 (Fed. Cl. March 14, 2013).

judicial resources," but also by advancing arguments "so thin as to border on the frivolous." *Evans v. United States*, 694 F.3d 1377, 1379, 1381 (Fed. Cir. 2012).

Because the Tenth Circuit broke from this Court's analysis in *Great Northern* and directly contradicted the holding of its sister circuits, *Brandt I* creates uncertainty about title to land encumbered by railroad easements established under the 1875 Act, at least in the Tenth Circuit. This uncertainty and the circuit-split will engender more wasteful litigation, needlessly consume judicial resources, further delay landowners being paid that compensation they are due, and require landowners to incur even more substantial litigation costs.

As the Federal Circuit observed in *Evans*, the Justice Department raises every conceivable argument, no matter how frivolous, to frustrate a landowner's right to compensation. The apparent hope seems to be that, by making Trails Act litigation long, arduous and costly, landowners (and their counsel) will be discouraged from seeking the compensation to which they are constitutionally entitled.

Unless addressed by this Court, the Tenth Circuit's poorly-reasoned decision in *Brandt I* and its split with the Federal and Seventh Circuits is another cudgel the government would use to prevent landowners whose property was taken under the Trails Act.

By granting the Brandt family's petition and resolving the circuit-split as to whether the United States may claim an "implied" reversionary interest under the 1875 Act, this Court will have resolved an

issue that allows thousands of other landowners' Fifth Amendment claims to be more efficiently resolved.

CONCLUSION

Brandt I is inconsistent with this Court's opinion in *Great Northern* and is directly contrary to the jurisprudence of the Federal and Seventh Circuits. This Court should grant Petitioner's request for *certiorari* and ultimately reverse and remand the Tenth Circuit's ruling.

Respectfully submitted,

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AMICUS CURIAE BRIEF

APR 25 2013

No. 12-1173

In The
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST
AND MARVIN M. BRANDT, TRUSTEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This case involves the General Railroad Right-of-Way Act of 1875 ("1875 Act"), under which thousands of miles of rights-of-way exist across the United States. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that 1875 Act rights-of-way are easements and not limited fees with an implied reversionary interest. Based upon the 1875 Act and this Court's decisions, the Federal and Seventh Circuits have concluded that the United States did not retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would continue a circuit split. The question presented is:

Did the United States retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership?

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INTEREST OF THE *AMICUS CURIAE*

Owners' Counsel of America (OCA) is a national, invitation-only network of the most experienced eminent domain and property rights attorneys.[1] They have joined together to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). As the lawyers on the front lines of property law and property rights, OCA members understand the importance of the issues in this case, and how redefinition of "easement" to "implied reversionary interest"—a decision which exacerbates the lower court split—will eliminate an entire class of rails-to-trails takings claims. This has resulted in the rights of owners whose property interests are based on grants subject to the General Railroad Right of Way Act of 1875, 43 U.S.C. § 934 (1875 Act) varying depending on the federal circuit in which their land happens to be located. If left unreviewed by this Court, the Tenth Circuit's decision will undermine well-settled expecta-

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1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

tions, and the common conception of what it means to own property subject to a right of way for railroad purposes.

OCA brings unique expertise to this task. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years, including *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990), and most recently *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), and *Koontz v. St. Johns River Water Management District*, No. 11-1447.[2]

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2. *See also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S. 7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.[3]

OCA believes its members' long experience in advocating for property owners and protecting their constitutional rights will provide an additional, valuable viewpoint on the issues presented to the Court.

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3. *See, e.g.*, Michael M. Berger, Taking Sides on Takings Issues (Am. Bar Ass'n 2002) (chapter on *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Policy 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 Loy. L.A.L. Rev. 685 (1986); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law And Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on *Prelitigation Process* and *Flooding and Erosion*).

SUMMARY OF ARGUMENT

Unable to prevail on a variety of theories in rails-to-trails takings cases in the Federal Circuit and the Court of Federal Claims (CFC) for more than a decade, the Government appears to have switched tracks. Instead of continuing its fruitless frontal attacks on these takings claims—efforts that repeatedly have been rebuffed by the courts—the Government in this case has sought to undermine the very notion of property by redefining the "rights of way" granted for railway uses under the 1875 Act from easements that are extinguished when no longer used for a railroad, to "implied reversionary interests."

This brief makes two points. First, the Government's strategy to redefine property rights based on the 1875 Act will virtually wipe out an entire class of takings claims without justification. Second, this Court's decision in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942)—holding that 1875 Act rights of way are easements—is supported by the common law definition of "right of way" prevailing at the time that the 1875 Act was adopted. In the absence of evidence of contrary intent, statutory terms used by Congress should be interpreted as having the meaning commonly assigned to them at the time. This case presents the Court with the opportunity to provide definitive guidance that terms in a federal statute that are not defined by Congress are not wholly malleable, and OCA respectfully asks this Court to review the important issues raised in the petition.

ARGUMENT

I. DERAILING 1875 ACT TAKINGS CASES

The Government instituted this quiet title action as part of its apparent strategy to eliminate an entire class of rails-to-trails cases by securing a ruling that owners of land subject to 1875 Act rights of way do not own "property," and thus cannot state a takings claim. In *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*Preseault I*), this Court sustained the federal rails-to-trails program[4] as a valid exercise of the federal commerce power, but concluded that converting an abandoned railroad right of way to trail use may "giv[e] rise to just compensation claims" under the Takings Clause. *Id.* at 13. Justices O'Connor, Scalia, and Kennedy elaborated, concluding that the conversion to trail use "may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights." *Id.* at 22 (O'Connor, J., concurring). In the subsequent Tucker Act case, the Federal Circuit held the Government liable for compensation when recreational trail use exceeds the scope of the original railroad right of way. *Preseault v. United States*, 100 F.3d 1525, 1541 (Fed. Cir. 1996) (en banc) (*Preseault II*). That decision set out the elements of a rails-to-trails takings case:

> Under *Preseault II*, the determinative issues for takings liability are (1) who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple

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4. National Trails System Act, 16 U.S.C. § 1241, *et seq.*

> estate; (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and (3) even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement).

Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1372-73 (Fed. Cir. 2009) (citing *Preseault II*, 100 F.3d at 1533). However, the Government refused to accept the situation and undertook an approach that recently led the Federal Circuit to wonder aloud "exactly what this *sturm und drang* is about" in rails-to-trails cases. *Evans v. United States*, 694 F.3d 1377, 1381 & n.7 (Fed. Cir. 2012) (citing Friedrich Maximilian Klinger, Der Wirrwarr, oder Sturm und Drang (1776)). The court criticized the Government's borderline frivolous strategy:

> And even more puzzling is why the Government, after *Bright* was decided, pursued the course it chose in the district courts and in this appeal, seeking with every possible argument—even if so thin as to border on the frivolous—to avoid acquiescing in plaintiffs' effort to have the district court judgments put aside and to proceed on the merits in the Court of Federal Claims.

Evans, 694 F.3d at 1381 (citing *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010)).

This is not an isolated example of the "scorched earth" approach. In 2002 Congress held hearings into rails-to-trails takings cases, and directed the Government to resolve these cases more quickly and more fairly than it had been. *See Litigation and Its Effect on the Rails-to-Trails Program: Hearing Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary*, 107th Cong.June 20, 2002), *available at* http://commdocs.house.gov/committees/judiciary/hju80320.000/hju80320_0f.htm. As described by a noted property owners' lawyer in a recent law review article, "[i]n the first several years following the *Preseault II* decision, the Department of Justice (DOJ) continued to challenge the United States' liability by recycling the unsuccessful argument it has made in *Preseault II*." Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 Ecol. L. Q. 673, 675-76 & n.6 (2011) (citations omitted). The article continues:

> After losing several liability arguments, culminating in a second Federal Circuit decision, *Toews v. United States*, the DOJ's challenges to the government's liability subsided. Beginning around 2003, the DOJ started stipulating to liability—or waiving the issue—instead of pursuing challenges in the courts. But the reprieve was brief.
>
> The DOJ has resurrected its challenges to the government's liability in recent years. In an apparent coordinated litigation strategy, the DOJ now routinely raises arguments that the Federal Circuit previously rejected. Worse for the attorneys and courts who do not typically deal with these Tucker Act cases, the DOJ advances these arguments without acknowledging the contrary

> law that was established during its earlier attempts to escape the government's liability.
>
> The DOJ's strategy relies on the marginalization of *Preseault II* as purportedly being limited to the facts in that case, glancing over the fundamental principles laid out in *Preseault I*, and ignoring *Toews* altogether. Accordingly, by recycling the arguments it made in *Preseault II* and *Toews*, the government persists in arguing in various guises that recreational use is no different from railroad use, or that railbanking is a "railroad purpose," so that nothing was taken from the landowner when the right of way became a recreational trail. In arguing that hikers and bikers are the same as railroad locomotives, the government sweeps several decades of contrary law under the rug.

Id. at 676 (citing *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004)). The courts have not been convinced, concluding it is "obvious,"[5] and that there is a "clear consensus" that trail use is "fundamentally different"[6] and "clearly different"[7] than a railway.

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5. *Anna F. Nordhus Trust v. United States*, 98 Fed. Cl. 331, 338 (2011) ("To state the obvious, removing tracks to establish recreational trails is not consistent with a railroad purpose, and cannot be regarded as incidental to the operation of trains.").

6. *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483, 487 (2011) ("There is clear consensus that recreational trail use is fundamentally different in nature than railroad use.").

7. *Ybanez v. United States*, 98 Fed. Cl. 659 (2011) ("The original parties to railroad conveyances between 1887 and 1891 would not likely have contemplated use of the right-of-way as a recreational trail. Such a use would be 'clearly different' from railway operations."). *See also Biery v. United States*, 99 Fed. Cl. 565, 576 (2011) ("Indeed, a recreational trail is only viable where the operation of trains has ceased. As such, recreational

See also Howard v. United States, 964 N.E.2d 779, 780-81 (Ind. 2012) (under Indiana law, railbanking and interim trail use are not within scope of railway easements).

Unsuccessful in rehashing the losing *Preseault II* arguments on liability, the Government shifted to making the same argument in the context of calculating just compensation, claiming that owners are entitled only to recover the value of the land encumbered by a trail easement. This too was rejected by the CFC. *See, e.g., Ingram v. United States*, 105 Fed. Cl. 518, 530 (2012) ("The measure of just compensation to the plaintiffs for the takings of plaintiffs' property should capture the value of the reversionary interests in their 'before taken' condition, unencumbered by the easements."); *Ybanez v. United States*, 102 Fed. Cl. 82, 88 (2011) ("The measure of just compensation is the difference between the value of plaintiffs' land unencumbered by a railroad easement, and the value of plaintiffs' land encumbered by a perpetual easement for recreational trail use."); *Rogers v. United States*, 101 Fed. Cl. 287, 294

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trail use is outside the scope of a railroad purpose easement."); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 145 (2011) ("A railroad . . has the primary purpose of transporting goods and people. The purpose of a recreational trail is fundamentally different. A bicycle trail does not exist to transport people but rather to allow the public to engage in recreation and enjoy the outdoors. The two uses are distinct and an easement for a recreational trail is not like in kind to an easement for railroads."); *Farmers Co-op. Co. v. United States*, 98 Fed. Cl. 797, 804 (2011) (railway purposes "are distinct from, and inconsistent with, use of the right-of-way as a recreational trail"); *Macy Elevator v. United States*, 97 Fed. Cl. 708, 730 (2011) ("The taking arises because recreational trail use does not fall within the scope of the original railroad easement.").

(2011) (measure of compensation is the difference between the land unencumbered by a railroad easement, and the land encumbered by an easement for recreational trail use and railbanking); *Raulerson v. United States*, 99 Fed. Cl. 9, 12 (2011) (same). The most recent example of a pointless argument surfaced in *Ladd v. United States*, No. 2012-5086, 2013 WL 1405871 (Fed. Cir. Apr. 9, 2013), in which the Federal Circuit soundly rejected the Government's argument the statute of limitations had started even though the government did not inform owners of the Notice of Interim Trail Use (NITU), the action triggering the right to institute a claim. The government itself was unaware of the NITU, yet it claimed the owners should have been.[8]

The present litigation must be viewed in light of these failed arguments, and the initial issue in rails-to-trails takings cases under *Preseault II*: if, as the Tenth Circuit concluded, property owners are deemed to not possess "property," then their takings claims magically vanish. *Preseault II*, 100 F.3d at 1533. This issue turns on "the nature of the original conveyance that established the railroad's right to operate a railroad on the property at issue." *Ellamae Phillips Co.*, 564 F.3d at 1373–74. *See also Preseault*

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8. The Government's rails-to-trails strategy has also needlessly increased the cost of resolving many of these cases, often beyond reason. For example, in *Hash v. United States*, No. 1:99-CV-00324-MHW, 2012 WL 1252624 (D. Idaho Apr. 13, 2012), the court awarded the plaintiffs $2.24 million in attorney's fees and costs under the Uniform Relocation Assistance and Real Estate Acquisition Act, 42 U.S.C. § 4601 *et. seq.* Which means that to secure an $883,312 just compensation award, it cost the plaintiffs more than two-and-a-half times that amount, and the taxpayers even more.

I, 494 U.S. at 21 (O'Connor, J., concurring) ("[d]etermining what interest petitioners would have enjoyed under [state] law, in the absence of the ICC's recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim."). In the Tenth Circuit, the court's decision in this case has virtually swallowed up every rails-to-trails takings case where the property owner's rights are based on a grant subject to the 1875 Act. This has continued the lower court split and results in similarly-situated landowners nationwide being subject to different federal rules, based only on the location of their land. *See* Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights Of Way and the Myth of Congress's "1871 Shift"*, 82 U. Colo. L. Rev. 85 (2011) (noting a split among the Federal, Seventh, Ninth, and Tenth Circuits). As the CFC noted:

> Since the Supreme Court's decision in *Great Northern*, cases have generally defined the right-of-way interest in 1875 Act as an easement. Unfortunately, however, the Supreme Court, in *Great Northern*, and in subsequent cases, has not provided a more specific definition of the term "easement" in the 1875 Act context.

Beres v. United States, 64 Fed. Cl. 403, 422 (2005) (footnote omitted). This case presents the opportunity for the Court to do so.

II. REVISING RIGHT OF WAY TO MEAN AN "IMPLIED" REVERSIONARY INTEREST FUNDAMENTALLY DEPARTS FROM ITS UNDERSTOOD MEANING

The Tenth Circuit's conclusion that the term "right of way" meant to signify the conveyance of a fee interest to the railroads with an implied right of reversion to the United States not only conflicts with this Court's ruling in *Great Northern*, but is a fundamental departure from the common law meaning of the term. Congress did not define "right of way" in the 1875 Act, but the prevailing understanding at the time of the 1875 Act in the federal courts was that a railroad right of way conveyed only an extinguishable easement. Thus, in *Southern Ry. Co. v. City of Memphis*, 97 F. 819 (6th Cir. 1899), the court denied a railroad's request to enjoin the city from removing its tracks because the "conditional easement" granted (limiting use to cars drawn by horse or other animal) was impossible to enjoy, and the easement terminated. The court likened the situation to an easement for a particular purpose, which "[i]f that purpose cease to exist, or its enjoyment become impossible, the grant is at an end." *Id.* at 822 ("Thus, where there was a reservation of a right of way over flats appurtenant to uplands, for water craft, to and from a dock or wharf, the easement was held to be extinguished by the subsequent construction by the city of a public street between the plaintiff's upland and the dock, which made access to the dock and deep water impossible."). The common law understanding of "right of way" in state courts at the time of the adoption of the 1875 Act was the same, as illustrated by the decision of the Wisconsin Supreme

Court concluding that the term described an easement, and not a fee or a reversionary interest:

> "Right of way," in its strict meaning, is "the right of passage over another man's ground," and in its legal and generally accepted meaning, in reference to a rail *way*, it is a mere easement in the lands of others, obtained by lawful condemnation to public use, or by purchase. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple of lands to be used for a railway or any other kind of way.

Williams v. Western Union Ry. Co., 5 N.W. 482, 484 (Wis. 1880) (emphasis original) (citing Henry E. Mills & Augustus L. Abbott, Mills on the Law of Eminent Domain § 110 (1879)). That understanding remains the same today, and many state courts have concluded that a railway right of way is an extinguishable easement. For example, the Washington Supreme Court rejected the argument that a rail right-of-way is a "perpetual public easement," and concluded that under Washington property law, it is an interest terminated when the railroad abandons a line:

> At common law, where a deed is construed to convey a right of way for railroad purposes only, upon abandonment by the railroad of the right of way the land over which the right of way passes reverts to the reversionary interest holder free of the easement.

Lawson v State, 730 P.2d 1308, 1311 (Wash. 1986). *See also Pollnow v. State Dep't of Nat. Resources*, 276 N.W.2d 738, 744 (Wis. 1979) ("We hold that the only interest the railroad gained in the right of way by

adverse possession was an easement."); *Michigan Dep't of Nat. Resources v. Carmody-Lahti Real Estate, Inc.*, 699 N.W.2d. 272, 280 (Mich. 2005) ("As we recognized over seventy years ago in *Quinn*, a deed granting a right-of-way typically conveys an easement, whereas a deed granting land itself is more appropriately characterized as conveying a fee or some other estate[.]") (citing *Quinn v. Pere Marquette Ry. Co.*, 239 N.W. 376 (Mich. 1931)).

When the 1875 Act was adopted, easements were incorporeal hereditaments only. Although a railroad easement has been described as "more than an ordinary easement[,]" having the "attributes of the fee," *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898), this did not alter a railroad right of way's fundamental nature as an easement. *See id.* ("The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad") (*quoting Smith v. Hall*, 72 N.W. 427 (Iowa 1897)). That a railroad easement may not be precisely the same as other easements does not alter the essential nature of the interest granted. As the Tenth Circuit noted in a case under a predecessor statute involving a railroad right of way, a different term was used because unlike common law easements, railway rights of way were generally exclusive:

> For the purposes of this case, we are not impressed with the labels applied to the title of the railroads in their rights-of-way across the public lands of the United States. The concept of "limited fee" was no doubt applied in *Townsend* because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion

> of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession the need for the "limited fee" label disappeared.

Wyoming v. Udall, 379 F.2d 635, 640 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967) (citing *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267 (1903)).[9] *See also* Black's Law Dictionary 408-09 (2d ed. 1910) (defining easement as a "right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner"). In contrast, a "limited fee" was understood to be "[a]n estate of inheritance in lands, which is clogged or confined with some sort of condition or qualification." *Id.* at 487.

To abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981). The burden is on the party claiming that Congress changed a common law meaning to show "the legislature intended such a change." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). The Government made no such showing here, and an examination of the legislative history of the 1875 Act reveals no Congressional intent to change the common meaning of "right of

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9. Notably, the 1875 Act did not convey a completely exclusive right. Section 2 barred railroad companies whose rights of way passed through areas of limited access, such as canyons, passes, or defiles, from preventing any other railroad company from use and occupancy of these areas, or to impede other forms of transportation in the area needed for public accommodation. 43 U.S.C. § 935.

way." The 1875 Act was designed to obviate the need for Congress to adopt new legislation for each new railroad, by providing a general statute applicable to all future grants within the territories. 3 Cong. Rec. 404 (1875). By the time Congress considered Senate Bill 378, which became the 1875 Act, it had already ceased its earlier practice of issuing out-and-out land grants to railways. *See* Cong. Globe, 42nd Cong., 2d Sess. 1585 (1872) (resolving to discontinue the practice of granting subsidies in public lands to railroads); *Great Northern*, 315 U.S. at 274 ("the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued") (internal quotations omitted); *Wyoming v. Udall*, 379 F.2d 635, 638 (10th Cir.) (From 1850 to 1871, "Congress subsidized railroad construction by lavish grants from the public domain. . . . In 1871, the policy changed and outright grants were discontinued."), *cert. denied*, 389 U.S. 985 (1967). Thus, the Act granted railroads only "the right of way through the public lands of the United States" with certain attendant rights to take surface materials from "the public land adjacent to the line of said road" and use land adjacent to the line for appurtenant station-buildings, depots, and other improvements. *See* 43 U.S.C. § 934.

Congress intended to grant only a limited interest to railroad operators. Discussing the bill, the chair for the Committee of Public Lands noted that during the preceding years, the committee had "been very conservative with regard to the appropriation of public lands to railroads[,]" that the committee had "endeavored to preserve the public lands for the benefit of actual settlers[,]" and that "[a]ll our grants of public lands, therefore, have been narrowed down

to rights of way." 3 Cong. Rec. 404 (1875) (remarks of Senator Townsend). *See also* 3 Cong. Rec. 1791 (1875) (Discussing a similar right of way grant to the Puyallup Valley Coal Company, Senator Sprague noted the bill "is merely to give the right of way for a railroad in Oregon . . . with the right to take material within the grant." When asked if it was a land grant, answered "[n]o land grant, not an acre."). One of the major issues Congress grappled with was the issue of what, if any, control the Territories (and later-admitted States) would have over the railroads and the freight to be transported. Senator Hawley described the interests being granted:

> This bill does not propose to charter any corporation. . . . What does it do? It simply and only gives the right of way. It merely grants to such railroad companies as may be chartered the right to lay their tracks and run their trains over the public lands; it does nothing more. This is all that can be got out of it by any possible construction. The simple right being given to locate a road and operate cars upon the track so located[.]

3 Cong. Rec. 407 (1875) (remarks of Senator Hawley). Nothing in the discussions of the bill suggests that Congress intended to grant any form of fee interest or contemplated a possibility of reverter.

In the absence of an express contrary definition or clear legislative history that reveals otherwise, terms used by Congress arising from the common law should be interpreted as carrying the same meaning. In drafting legislation, Congress is charged with knowing the existence and meaning of these terms. "Congress is understood to legislate against a background of common law . . . principles. Thus, where a

common-law principle is well established, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). Further, "[j]ust as longstanding is the principle that '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (*quoting Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). In these cases, Congress "does not write upon a clean slate." *United States v. Texas*, 507 U.S. at 534 (*citing Astoria*, 501 U.S. at 108). This principle is particularly appropriate where the use of the common law would be for "filling a gap left by Congress' silence" as opposed to "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Altering the fundamental nature of well-established common law understandings should not be read into Congress' mere silence.

In *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880), this Court held "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." If changes such as the Tenth Circuit found here were intended by Congress, "surely the statute would have said something more." *Id.* Thus, changes to the fundamental, underlying nature of well-established terms cannot be read into Congress' silence. Where Congress adds rights or conditions on

top of common law rights, these additions are to be read narrowly and not to cause other changes unaddressed in the legislation. In the 1875 Act, Congress granted a special type of easement allowing railroads to use land as long as they operated a railway. When that use ceased, the land would become the property of the owner of the underlying tract. Congress did not grant the railroads a fee interest subject to the Government's implied reversion that would spring forth over a century later to wipe out a property owner's right to compensation.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Tenth Circuit's judgment.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the General Railroad Right-of-Way Act of 1875 (1875 Act), under which thousands of miles of rights-of-way were established across the United States. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that the 1875 Act rights-of-way are easements and not limited fees with an implied reversionary interest. Based upon the 1875 Act and this Court's decisions, the Federal and Seventh Circuits have concluded that the United States did not retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would continue a circuit split. The question presented is:

Did the United States retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation submits this brief amicus curiae in support of Petitioners Marvin M. Brandt Revocable Trust and Marvin M. Brandt (Brandt).[1]

Pacific Legal Foundation (PLF) was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before this Court in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Koontz v. St. Johns River Water Management District* (U.S. Supreme Court No. 11-1447); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*,

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[1] All parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

483 U.S. 825 (1987). PLF attorneys are familiar with the issues surrounding the government's policy of converting abandoned railroad tracks to recreational trails, having participated as amicus curiae in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective will aid this Court in considering Brandt's petition.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT

This case raises important questions regarding the common law of property ownership and the certainty of titles in property. Brandt owns a parcel of property in fee simple. Pet. at 11-12. An abandoned railroad right-of-way easement, established under the General Railroad Right-of-Way Act of 1875 (1875 Act), traverses his land. *Id.* According to the common law, the railroad easement was extinguished upon its abandonment and Brandt owns his land unencumbered by the right-of-way. *Preseault v. United States*, 100 F.3d 1525, 1545 (Fed. Cir. 1996); *Carney v. Board of County Commissioners of Sublette County*, 757 P.2d 556, 562-63 (Wyo. 1988). The Tenth Circuit, however, adopted a new rule of federal property law, holding that the United States—the original grantor of the railroad easement and Brandt's fee estate—held an implied reversionary interest in the easement, even though the government had patented the underlying property and sold the land without a reservation of reversionary rights. Pet. Cert. App. at 3-6, 18-21, 26.

As fully set out in the Petition, the Tenth Circuit's rule directly conflicts with decisions of this Court as well as decisions from the Federal Circuit, the Court of

Federal Claims, and the Seventh Circuit. Pet. at 17-34. The split of authority regarding ownership of abandoned railroad rights-of-way has been growing for years, and is well-documented. *See, e.g.*, Pet. Cert. App. at 5-6, 22-24 (discussing split of authority); *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005) (same); 11 *Powell on Real Property* § 78A (referring to the existing split of authority as a "mess [that] is not entirely fixed" and in need of "thorough analysis"); Roger Cunningham, et al., *The Law of Property* § 8.9, p. 460 (2d ed. 1993) (decisions concerning railroad rights-of-way "are in considerable disarray").

Amicus PLF urges the Court to grant the Petition to resolve this conflict, especially because the Tenth Circuit's rule departs from ordinary understandings of property ownership. Specifically, the Tenth Circuit altered the common law definitions of easements and freehold estates by holding that the common law of property categorically does not apply to disputes over ownership of railroad easements. Pet. Cert. App. at 5 (citing *Idaho v. Oregon Short Line Railroad Co.*, 617 F. Supp. 207, 212 (D. Idaho, 1985)). *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (disapproving of categorical rules that reduce property rights). The Tenth Circuit's rule deprives property owners of their right to exclusive ownership of their land. If left unreviewed, the decision below will unsettle the rights and expectations of thousands of property owners within the Circuit and nationwide. *See, e.g., Brown v. Washington*, 924 P.2d 908, 916 (Wash. 1996) (relying on federal precedent to determine ownership of abandoned railroad easements). PLF, therefore, urges this Court to grant the Petition to reaffirm the common law principle that ownership of land is determined by title.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I

THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE COMMON LAW OF PROPERTY OWNERSHIP

The property interest at issue in this case is a fee holder's right to reclaim exclusive ownership of lands underlying an abandoned easement that traverses his land. That right is well-recognized by the common law of property. *Preseault*, 100 F.3d at 1542-46; *Carney*, 757 P.2d at 562-63. The Tenth Circuit, however, adopted a *per se* rule that grants the federal government ownership of a fee holder's reversionary interest in an abandoned railroad easement, and consequently refused to consider Brandt's common law property rights to determine ownership of the abandoned easement. Pet. Cert. App. at 5-6.

A. Property Rights Created by Federal Land Grants Are Determined in Accordance with the Common Law

The Tenth Circuit's repudiation of the common law is fundamentally at odds with decisions of this Court and other courts that have relied on the common law to define property interests in railroad right-of-way cases. Indeed, the common law guided this Court in construing the 1875 Act. In *Great Northern Railway Company v. United States*, 315 U.S. 262 (1942), this Court considered whether the 1875 Act conveyed railroad rights-of-way as easements or as limited fees. This Court determined that Congress' use of the phrase "right of way" in the statute was intended only to create an easement because that phrase was

consistent with the common law understanding of easements and was wholly inconsistent with the rights associated with fee estates. *Id.* at 271 ("The Act of March 3, 1875 . . . clearly grants only an easement, and not a fee.").

This Court also relied on the common law to determine the property rights acquired in patented lands that are burdened by a right-of-way easement. *Smith v. Townsend*, 148 U.S. 490, 499 (1893) ("Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract, subject to the easement of the company; and if ever the use of that right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land.").

In fact, early administrative land decisions viewed railroad rights-of-way as common law easements, and relied on common law principles to define the nature and scope of federal land grants when the property is traversed by a railroad right-of-way. For example, an 1888 decision instructed that patentees must pay for the full area purchased with no deduction for the right-of-way easement because the patentee was taking title to the entire tract, including the land underlying the easement:

> The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee . . . . All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of

> subdivision entered, there being no authority to make deductions in such cases.

Great Northern, 315 U.S. at 275 n.13 (quoting 12 L.D. 423, 428 (Jan. 13, 1888)). Many other decisions from that period apply common law principles to resolve disputes concerning railroad rights-of-way.[2] *See, e.g.*, *John W. Wehn*, 32 Pub. Land Dec. 33, 34 (1903) (noting that the rights-of-way granted under the 1875 and 1891 Acts were mere easements and that the applicant who purchased land over which they passed would therefore be required to pay for the entire tract); *Brucker v. Buschmann*, 21 Pub. Land Dec. 114, 115 (1895) (finding railroad right-of-way does not diminish the acreage held in fee by the homesteader); *Mary G. Arnett*, 20 Pub. Land Dec. 131, 132 (1895) (A grant under the 1875 Act conveyed "an easement and not the land."); *Pensacola & Louisville R.R. Co.*, 19 Pub. Land Dec. 386, 388 (1894) (holding that "lands across which a right-of-way is claimed by a railroad company [under federal land grants] may be disposed of by patent" and that the "patentees will take the servient tenement, subject to whatever servitude may exist, and they will find ample protection in the courts, should any attempt be made to deprive them of the use or occupancy of their land"); *Fremont, Elkhorn and Missouri Valley Ry. Co.*, 19 Pub. Lands Dec. 588, 599 (1894) ("That the right of way granted by the [1875] act in question is a mere easement can not be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of subject to the right of way.' "); *Eugene McCarthy*, 14

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[2] Public Land Decisions are administrative orders issued between 1881 and 1929 by the U.S. Department of Interior and General Lands Office in cases relating to public lands.

Pub. Land Dec. 105, 110 (1892) (title to mineral claim would become unrestricted upon abandonment of federal land grant right-of-way); *Right of Way*, 12 Pub. Land Dec. 423, 428 (1891) (under the 1875 Act, settlers take the full tract of land that is subject to the right-of-way).

Simply put, the common law understandings of easements and freehold estates defined the character of property interests conveyed in federal land grants and patents.

B. Disputes over Ownership of Abandoned Railroad Rights-of-Way Are Determined by Reliance on Common Law Principles

The Tenth Circuit's rule also conflicts with the Federal Circuit's reliance on the common law to determine whether a landowner has a protected property interest in an abandoned right-of-way. *See, e.g., Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); *Hash*, 403 F.3d at 1314; *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004); *Preseault*, 100 F.3d at 1533. Determining the character of a right-of-way is a necessary step before deciding ownership of the land because not all railroad rights-of-way involve the same property interest. *See* Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 Ecology L.Q. 673, 686-89 (2011). At certain times in history, the federal government granted the railroad companies rights-of-way as limited fee estates. *See, e.g., Great Northern*, 315 U.S. at 273-74; *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903). At other times, the government granted the railroad companies rights-of-way as easements. *Great Northern*, 315 U.S.

at 271. The type of right-of-way owned by a railroad depends upon the specific terms and conditions of the original conveyance, which, in turn, relies on common law understandings of easements and fee estates. *Id.*

At common law, there is a stark difference between a limited fee and an easement. A grant of a limited fee estate (also known as a fee simple determinable, base fee, or qualified fee) creates a fee simple subject to a special limitation, such as a requirement that the property be used only for railroad purposes. *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 485 (10th Cir. 1998) (citing Chester H. Smith & Ralph E. Boyer, *Survey of the Law of Property* 8 (2d ed. 1971)); *see also State of Wyoming*, 27 IBLA 137, 164 (1976) (Chief Administrative Judge Frishberg, dissenting) (citing L. M. Simes, *Law of Future Interests* 28-29 (2d ed. 1966)). Upon the occurrence of the special limitation, the fee estate automatically terminates and the property reverts to the grantor or his successors in interest. *Mount Olivet Cemetery*, 164 F.3d at 485; *State of Wyoming*, 27 IBLA at 164 (citing Simes, *supra*; 1 Tiffany, *Real Property* § 220 (3d ed. 1939)).[3] But, until the condition for reverter is triggered, the owner of the limited fee is considered the "absolute owner of the land." *Choctaw O. & G. R.R. Co. v. Mackey*, 256 U.S. 531, 538-39 (1921).

A conveyance of an easement transfers no ownership in the underlying land to the holder of the right-of-way. *Preseault*, 100 F.3d at 1542; *see also Louis W. Epstein Family Partnership v. Kmart Corp.*,

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[3] The Interior Board of Land Appeals reviews decisions of departmental administrative judges concerning public lands.

13 F.3d 762, 766 (3d Cir. 1994) ("[T]he owner of land, who grants a right of way over it, conveys nothing but the right of passage and reserves all incidents of ownership not granted."); *Board of County Sup'rs of Prince William County, Va. v. United States*, 48 F.3d 520, 527 (Fed. Cir. 1995) ("[A] fee simple estate is not an easement, or vice versa."). Instead, an easement creates a servitude on the land that grants the holder "a right to make use of the land over which the easement lies for the purposes for which it was granted." *Preseault*, 100 F.3d at 1545 (citing 7 Thompson on Real Property § 60.02(c), (d)). And when the easement is abandoned, the easement is extinguished and the underlying fee becomes unburdened. *Preseault*, 100 F.3d at 1545; *Carney*, 757 P.2d at 562-63.

According to those common law principles, ownership of an abandoned right-of-way depends on the character of the right-of-way. Where the railroad acquired a fee interest in the right-of-way, title no longer remained in the United States. *Northern Pacific*, 190 U.S. at 270. The federal government held a possibility of a reverter (by operation of the special limitation in the grant), but the land itself belonged to the railroad company. *Id.* at 271. Therefore, a subsequent grant of the surrounding property could not transfer title to the land underlying the right-of-way. *Id.* at 270. And the owner of the surrounding lands did not acquire a reversionary interest in the railroad right-of-way.

However, where the railroad acquired a right-of-way easement, title to the underlying property remained in the United States. *Hash*, 403 F.3d at 1314. Thus, a subsequent patent of the property

conveyed the entire tract, including the easement and the reversionary interest therein, to the patentee. *Railroad Co. v. Baldwin*, 103 U.S. 426, 430 (1880); *Energy Transp. System Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696, 698-99 (8th Cir. 1980) (ruling servient estate to railway grant passed when state acquired federal lands); *see also Boesche v. Udall*, 373 U.S. 472, 477 (1963) (a land patent "divests the government of title"). The government grantor cannot retain an implied reversionary interest in an abandoned easement located on private property without effecting an uncompensated taking of the fee holder's property rights. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668, 678-79 (1979); *Hash*, 403 F.3d at 1318 ("[P]roperty rights that are not explicitly reserved by the grantor cannot be inferred to have been retained."). Thus, it is essential to determine the common law character of the right-of-way before a court can decide who owns the reversionary rights in the land.

C. The Tenth Circuit's Rule Repudiates the Common Law

The Tenth Circuit's decision creates so many conflicts with other decisions because it adopts a categorical rule that (1) changes the definition of an easement and (2) holds that the common law of property does not apply to disputes over ownership of abandoned railroad easements. Pet. Cert. App. at 5-6. As shown above, the Tenth Circuit's rule finds no support in this Court's case law. Instead, the Tenth Circuit created its rule by elevating a poorly reasoned trial court opinion to the status of binding Circuit precedent. Pet. Cert. App. at 5 (citing *Oregon Short Line Railroad*, 617 F. Supp. at 212; *see also Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028,

1030-32 (10th Cir. 1994) (adopting the "result and rationale" of *Oregon Short Line*)).

Oregon Short Line is a summary judgment opinion resolving a dispute over ownership of an abandoned right-of-way easement. 617 F. Supp. at 208-09. Key to the dispute was whether the federal government held an implied reversionary interest in the easement. *Id.* at 209, 211-12. Although an implied reversionary interest is not recognized by the common law, the Idaho federal district court ruled that the federal government could create a new property interest. *Id.* at 211-12. The trial court explained that the government, in authorizing grants for right-of-way easements, had the authority to "pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests" in order to create an "implied condition of reverter" on all such conveyances. *Id.* at 212. Because of that, the court refused to consider the common law rules regarding easements, holding instead that the "precise nature of [the] retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law." *Id.* Thus, the trial court concluded that the federal government, in enacting the 1875 Act, had *implicitly* suspended the common law and had *impliedly* reserved a reversionary interest in all railroad right-of-way easements. *Id.*

The Tenth Circuit's decision to adopt the reasoning of *Oregon Short Line* as a *per se* rule of federal property law threatens our common law system of property ownership. Indeed, legal scholars recognize that the conflict between the Tenth Circuit and the Federal Circuit engenders a "fundamental contradiction" in the law of property. 11 *Powell on*

Real Property § 78A. Even scholars who support the modern rails-to-trails policy acknowledge that *Oregon Short Line* created a property interest that is neither recognized nor bound by common law principles. Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. United States and the Threat to Rail-Trail Conversions*, 38 Envtl. L. 711, 731-32 (2008) (*Oregon Short Line* corrected Congress' "unfortunate use of the term 'easement'" by overriding the common law rules.); Gregg H. Hirakawa, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 Seattle U. L. Rev. 481, 504 (2001) ("Since federal 'easements' on public land are granted by Congress, the easements are subject to Congressional desires rather than common law."); Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift"*, 82 U. Colo. L. Rev. 85, 101 (2011) (Since railroad easements are not bound by the common law in the Tenth Circuit, courts can alter the language of a federal land grant to advance modern government interests such as the rails-to-trails policy.).

Landowners deserve to have their property rights determined by the title they hold in their land, not by a court-created *per se* rule. The Tenth Circuit's decision to the contrary raises important questions of property law and warrants review by this Court.

II

THE TENTH CIRCUIT'S *PER SE* RULE THREATENS THE CERTAINTY AND STABILITY OF TITLE

The consequences of the Tenth Circuit's decision are far-reaching. Landowners rely on their titles to establish ownership of property. But if courts are unwilling to give effect to titles, the owners' interests and expectations in their property become potentially worthless. Accordingly, this Court has a long-standing policy of avoiding rules or constructions that unsettle titles. *Leo Sheep*, 440 U.S. at 687 ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned[.]") (citing *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U.S. 196, 206-07 (1886); *Lessee of Irwin H. Doolittle's Lessee v. Bryan*, 55 U.S. 563, 567 (1852)); *see also Beres v. United States*, 64 Fed. Cl. 403, 427 (2005) ("A fundamental precept of our property ownership system and system of laws includes certainty of ownership upon purchase, whether by receipt of a land patent from the federal government or a deed from a private party.").

This case provides a good example of the rights threatened by the Tenth Circuit's decision. Brandt's parents acquired title in fee simple to property traversed by an abandoned railroad easement. Pet. at 10-11. It is well-recognized that a federal land patent passes "a perfect and consummate title" to the owner. *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839); *Hash*, 403 F.3d at 1314-15 (A patent "'conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues . . . such patentee takes the fee subject only to the railroad company's

right of use and possession'.") (quoting 43 C.F.R. 243.2 (1909) (repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701, *et seq.*)). Once a parcel is patented and sold as private property, the federal government "is absolutely without authority" to alter the property interests transferred. *Moore v. Robbins*, 96 U.S. 530, 533 (1877). Because the federal government did not reserve any reversionary rights in the railroad easement when it sold its property, Brandt has a common law right to exclusive ownership of the land underlying the abandoned right-of-way.

The Tenth Circuit's decision, however, repudiates those common law principles and authorizes the government to take some of the property back decades after the land was sold. Under the lower court's rule, "titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, [are] subject to the fluctuating, and in many cases unreliable, action of the [government]." *Moore*, 96 U.S. at 533. The Tenth Circuit's decision is contrary to policies underlying our property system and warrants review. *Beres*, 64 Fed. Cl. at 427 ("The average citizen, the reasonable man, expects that a contract to transfer land, whether from a public or private owner, is effective and will not be retroactively changed many years after the land transfer.").

CONCLUSION

The Tenth Circuit's repudiation of the common law rights inherent in fee simple title creates a conflict that, by itself, warrants certiorari. But the need for this Court's review is heightened by the fact that the lower court adopted a harmful rule that has the capacity to unsettle the expectations of property owners across the Nation. This Court should grant Brandt's petition.

DATED: April, 2013.

Respectfully submitted,

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JOINT APPENDIX

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 15 2013
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No. 12-1173

In The Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST AND MARVIN M. BRANDT, TRUSTEE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 22, 2013
Certiorari Granted October 1, 2013

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Relevant Docket Entries from the United States District Court for the District of Wyoming, 2:06-cv-00184-ABJ

Date Filed	No.	Docket Text
07/14/2006	1	COMPLAINT (Thirty-nine summonses issued), filed by United States of America. (szf) (Entered: 07/17/2006)
		* * *
08/08/2006	59	ANSWER to Complaint with Affirmative Defenses, COUNTERCLAIM against Counter-Defendant United States of America by Defendant Marvin M Brandt. (Attachments: # 1 Exhibit) (Pendley, William) Modified on 8/8/2006 (sjlg). (Entered: 08/08/2006
		* * *
10/10/2006	89	*United States' Reply to Counterclaims of Defendant Marvin M. Brandt* ANSWER to Counterclaim by Counter Defendant United States of America. Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (Vassallo, Nicholas) (Entered: 10/10/2006)
		* * *
03/09/2007	105	AMENDED COMPLAINT for Declaratory Judgment of Abandonment and to Quiet Title against Defendant Donna Ellen

Gruber, Edmund L Gruber, Kathlynn A Lambert, David M Pearce, Dorothy M Pearce, Robert S Pearce, Steven M Pearce, Billy M Ratliff, Tobin L Ratliff, Lynda L Rinker, Patrick R Rinker, Janis A Taffe, Steven P Taffe, Helen D Yeutter, Ronald B Yeutter, Elizabeth Keeney, Susan Torres, Rondal Wayne, Juan Torres, Debra R Hinkel, Roger L Morgan, Daniel K McNierney, Susan McNierney, Ralph L Lockhart, Duane King, Patricia King, Marilyn Flint, Marjorie Secrest, Norma J Breazeale, Marvin M Brandt, Gary Williams, June Williams, Glenna Marrs, Kenneth R Lankford, II, Kenneth R Lankford, Sr, Patrick R Rinker, Patricia A Rinker, David Yeutter, Marilyn Yeutter, Snowy Range Properties LLC, Michael Palmer, Sally Palmer, Ray L Waits, Vernon H Breazeale, Eugene L Budnick, Donald Graff, Wanda Graff, Lawrence R Otterstein, Ginny L Otterstein, Wyoming and Colorado Railroad Company Inc, Albany County Board of County Commissioners, DuWayne Keeney , filed by United States of America. (sjlg) (Entered: 03/09/2007)

* * *

10/01/2007	137	REFERRED TO MAGISTRATE JUDGE. MOTION to Amend/ Correct (105 in 2:06-cv-00184-ABJ) Amended Complaint, filed by Counter Claimant Marvin M Brandt, Defendant Marvin M Brandt. (Attachments: # 1 Amended Answer and Counterclaims# 2 Proposed Order) Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (McMahon, Joshua) (Entered: 10/01/2007)
10/02/2007	138	ORDER by the Honorable William C Beaman granting (137 in 2:06-cv-00184-ABJ, 57 in 2:06-cv-00171-ABJ) MOTION to Amend/ Correct (105 in 2:06-cv-00184-ABJ) to Substitute Real Parties in Interest and to Amend the Caption Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (sjlg) (Entered: 10/03/2007)
10/10/2007	139	MOTION for Summary Judgment, filed by Counter Claimant Marvin M Brandt, Defendant Marvin M Brandt. Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (McMahon, Joshua) (Entered: 10/10/2007)
		* * *
10/10/2007	142	MOTION for Summary Judgment, *on the Second Counterclaim of Defendants/Counterclaimants*

		Marvin M. Brandt Revocable Trust and Marvin M. Brant, Trustee, filed by Plaintiff United States of America. Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (Statkus, Carol) (Entered: 10/10/2007)
		* * *
11/13/2007	147	RESPONSE in Opposition re (142 in 2:06-cv-00184-ABJ) Motion for Summary Judgment, (144 in 2:06-cv-00184-ABJ) Motion for Summary Judgment, filed by Counter Claimant Marvin M Brandt, Defendant Marvin M Brandt. (Attachments: # 1 Exhibit Second Declaration of Marvin M. Brandt) Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (McMahon, Joshua) (Entered: 11/13/2007)
11/13/2007	148	RESPONSE in Opposition re (139 in 2:06-cv-00184-ABJ) Motion for Summary Judgment filed by Plaintiff United States of America. Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (Vassallo, Nicholas) (Entered: 11/13/2007)
		* * *
12/04/2007	153	REPLY to (147 in 2:06-cv-00184-ABJ) Response in Opposition to

		Motion, filed by Counter Defendant United States of America, Plaintiff United States of America. (Attachments: # 1 Attachments A & B and Declarations of Clinton D. Kyhl, Rick D. Cables and Casey B. Hull)Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (Statkus, Carol) (Entered: 12/04/2007)
12/04/2007	154	REPLY to (148 in 2:06-cv-00184-ABJ) Response in Opposition to Motion *for Summary Judgment* filed by Counter Claimant Marvin M Brandt, Defendant Marvin M Brandt. Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ(McMahon, Joshua) (Entered: 12/04/2007)
		* * *
04/08/2008	170	MEMORANDUM OPINION AND ORDER by the Honorable Judge Alan B Johnson Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (sjlg) (Entered: 04/09/2008)
		* * *
4/18/2008	172	REFERRED TO MAGISTRATE JUDGE. MOTION for Order *Defendant's Motion to Transfer Third Counterclaim to the United States Court of Federal Claims* filed by Counter Claimant Marvin M Brandt, Defendant Marvin M

		Brandt. (Attachments: # 1 Proposed Order Proposed Order Granting Defendant's Motion To Transfer Third Counterclaim to the United States Court of Federal Claims)Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (McMahon, Joshua) (Entered: 04/18/2008)
4/18/2008	173	MOTION to Dismiss for Lack of Jurisdiction, *Motion to Dismiss Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, and United States' Opposition to Transfer* filed by Counter Defendant United States of America, Plaintiff United States of America. (Attachments: # 1 Proposed Order)Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (Vassallo, Nicholas) (Entered: 04/18/2008)
		* * *
03/02/2009	200	JUDGMENT IN FAVOR of the United States on its Claims Against MARVIN M BRANDT Revocable Trust and MARVIN M BRANDT, Trustee and on the First and Second Counterclaims of MARVIN M BRANDT Revocable Trust and MARVIN M BRANDT, Trustee by the

		Honorable Judge Alan B Johnson ORDERED, ADJUDGED and DECREED (92) Motion for Order in case 2:06-cv-00171-ABJ; ordering (172) Motion for Order in case 2:06-cv-00184-ABJ Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (sbad) (Entered: 03/03/2009)
		* * *
03/04/2009	202	ORDER Granting 93 (173) in case 2:06-cv-00171-ABJ Plaintiff 's Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Without Prejudice and Denying 92 (172) in case 2:06-cv-00171-ABJ Defendant Marvin M. Brandt Revocable Trust's, Marvin M. Brandt, Trustee, MOTION to Transfer the Third Counterclaim to the United States Court of Federal Claims. Associated Cases: 2:06-cv-00184-ABJ, 2:06-cv-00171-ABJ (szf) (Entered: 03/04/2009)
		* * *
04/29/2009	206	NOTICE OF APPEAL as to 200 Order on Motion for Order, 170 Order on Motion for Summary Judgment,, 202 Order on Motion for Order,, Order on Motion to Dismiss/Lack of Jurisdiction, filed by Counter Claimant Marvin M Brandt, Defendant Marvin M

Brandt. Filing fee $455 due. (Pendley, William) (Entered: 04/29/2009)

* * *

Relevant Docket Entries from the United States Court of Appeals for the Tenth Circuit, No. 09-8047

Date Filed	Docket Text
05/01/2009	[9655512] Civil case docketed. Preliminary record filed. DATE RECEIVED: 04/29/2009 Docketing statement due 05/15/2009 for Marvin M. Brandt. Transcript order form due 05/15/2009 for William Perry Pendley. Notice of appearance due on 05/15/2009 for Marvin M. Brandt and United States of America.
	* * *
09/30/2009	[9697616] Appellant's brief – [Edited 10/05/2009 by BV]filed by Mr. Marvin M. Brandt. Original and 7 copies. Served on 09/30/2009. Manner of Service: US mail, ECF/NDA. JS.
	* * *
10/05/2009	[9699131] Appendix filed by Appellant Mr. Marvin M. Brandt. Original and 1 copies. Appendix pages: 242. Number of volumes: 1. Hardcopy only. Served on 09/30/2009. Manner of Service: US mail.
	* * *
12/14/2009	[9719668] Appellee/Respondent's brief filed by United States of America. Original and 7 copies. Served on: 12/14/2009. Manner of service: US mail,

ECF/NDA. Oral argument requested? Yes. KJB.

12/14/2009 [9720254] Appendix filed by Appellee United States of America. Original and 1 copy. Appendix pages: 11. Number of volumes: 1. Hardcopy only. Served on 12/14/2009. Manner of Service: US mail.

* * *

12/21/2009 [9722788] Amicus Curiae brief filed by Rails to Trails Conservancy. Original and 7 copies. Served on 12/21/2009. Manner of Service: email, clerk.

01/21/2010 [9730326] Appellant/Petitioner's reply brief filed by Mr. Marvin M. Brandt. Original and 7 copies. Served on 01/21/2010. Manner of Service: clerk. JS.

* * *

06/28/2011 [9879541] Supplemental authority filed by Mr. Marvin M. Brandt and Marvin M. Brandt Revocable Trust. Served on 06/28/2011. Manner of Service: ECF/NDA. JS.

07/07/2011 [9882008] Response filed by United States of America to Appellants' Letter of Supplemental Authority. Served on 07/07/2011. Manner of Service: ECF/NDA. KJB.

* * *

09/11/2012	[10000112] Affirmed. Terminated on the merits after oral hearing. Written, unsigned, unpublished (Enter for the court Per Curiam). Judges Kelly, O'Brien(concurring), and Holmes. Mandate to issue. [09-8047]
10/24/2012	[10013294] Petition for rehearing en banc, for rehearing filed by Mr. Marvin M. Brandt and Marvin M. Brandt Revocable Trust. Original and 18 copies. Served on 10/24/2012. Manner of Service: ECF/NDA. [09-8047] SJL
	* * *
10/25/2012	[10013766] Order filed by Judges Kelly, O'Brien and Holmes directing a response to the petition for rehearing en banc and/or panel rehearing on or before 12/18/2012 for United States of America. Served on 10/25/2012. [09-8047] – [Edited 10/30/2012 by AT – Appellee was granted an extension of time to file a response.]
12/18/2012	[10029368] Response filed by United States of America to Appellant's petition for rehearing en banc and/or panel rehearing. Served on 12/18/2012. Manner of Service: ECF/NDA. [09-8047] KJB
12/26/2012	[10030875] Order filed by Judges Kelly, O'Brien and Holmes denying petition for rehearing and rehearing en banc filed by Appellants Mr. Marvin M. Brandt and Marvin M. Brandt Revocable Trust. [09-8047]

03/27/2013	[10057270] Petition for writ of certiorari filed by Marvin M. Brandt Revocable Trust, et al. on 03/22/2013. Supreme Court Number 12-1173. [09-8047]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. WYOMING AND COLORADO RAILROAD COMPANY, INC., et al. Defendants.	)	No. 06-CV-0184J and Consolidated Case No. 06-CV-171J

STIPULATION OF THE UNITED STATES AND DEFENDANT WYOMING AND COLORADO RAILROAD COMPANY, INC.

(Filed Nov. 28, 2006)

Plaintiff United States, by and through the United States Attorney for the District of Wyoming and Assistant United States Attorneys Carol A. Statkus and Nicholas Vassallo, and Defendant Wyoming and Colorado Railroad Company, Inc., by and through its attorney, Karl Morell of Ball Janik L.L.P., Washington, D.C., agree and stipulate as follows:

1. The Wyoming and Colorado Railroad Company (WYCO) is a party defendant in this action filed by the United States.

2. Karl Morell hereby enters his appearance on behalf of WYCO in this case.

3. WYCO acknowledges adequate service of process.

4. WYCO does not contest personal or subject matter jurisdiction or venue.

5. The lands subject to this action are those within the right-of-way granted under the General Railroad Right-of-Way Act of 1875 to the Laramie, Hahn's Peak and Pacific Railroad Company as described in paragraphs 11, 12, and 13 of the Government's Complaint ("the right-of-way").

6. WYCO is the successor to the Laramie, Hahns Peak and Pacific Railway Company.

7. WYCO operated the rail line until around September, 1995.

8. On May 16, 1996, WYCO filed a Petition for Exemption with the Surface Transportation Board (STB), seeking to administratively abandon its Coalmont Branch in Albany County, Wyoming, from the Colorado State line to near Laramie, Wyoming.

9. On September 16, 1996, the STB authorized the abandonment of the Coalmont Branch and established conditions of abandonment related to protecting historic integrity of sites and structures along the right-of-way, protecting geodetic station markers and consulting with the Forest Service regarding salvage activities.

10. WYCO removed the tracks and ties in 1999 and 2000.

11. On December 31, 2003, the STB removed the last of the conditions, thus permitting WYCO to consummate the abandonment of the rail line.

12. On January 15, 2004, WYCO notified the Secretary of the STB that it had consummated the abandonment of the Coalmont Branch.

13. Concerning those lands which are the subject of this action, namely the 28.08 miles of the right-of-way from the National Forest boundary near

Albany to the Wyoming Colorado state line encompassing approximately 637.09 acres, WYCO has terminated all railroad activities and hereby stipulates that it abandons any and all rights, title and interests it may have in the right-of-way, in accordance with 43 U.S.C. § 912.

14. WYCO agrees to the entry of a judicial decree of abandonment of the right-of-way.

15. WYCO takes no position on quiet title claims raised by the United States or the other Defendants and does not need to be involved in further proceedings.

SO STIPULATED AND AGREED.

THE UNITED STATES
OF AMERICA

MATTHEW H. MEAD
United States Attorney

Dated: 11/28/06 By: /s/ Carol A. Statkus
Carol A. Statkus, Assistant
United States Attorney

Nicholas Vassallo,
Nicholas Vassallo, Assistant
United States Attorney

DEFENDANT THE
WYOMING AND
COLORADO RAILROAD,
COMPANY, INC.

Dated: _____ By: /s/ Karl Morell
Karl Morell, its attorney
Ball Janik LLP

[Certificate Of Service Omitted In Printing]

EXHIBIT 3

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA Plaintiff, v. WYOMING AND COLORADO RAILROAD COMPANY, INC., et al., Defendants.	No. 06CV184-J **DECLARATION OF MARVIN M. BRANDT** (Filed Oct. 10, 2007)

I, Marvin M. Brandt, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and correct to the best of my knowledge:

1. In 1939, my father, Melvin M. Brandt began working at the sawmill located in Fox Park, Wyoming. Subsequently, in 1944, my father, in part, purchased the sawmill.

2. In 1946, at two years of age, my family moved to Fox Park, Wyoming. Thereafter, I attended Fox Park Grade School through grade eight.

3. In 1958, I began working at the sawmill.

4. In 1976, the Forest Service patented 83.32 acres of land in Fox Park, Wyoming, to my parents Melvin M. Brandt and Lula M. Brandt. A copy of the Patent is attached to Defendants' Statement of Undisputed Material Facts ("DSOF") at Exhibit 1.

5. From 1976 until 1991, I owned and operated the sawmill in Fox Park, Wyo. In 1991, I permanently closed the sawmill.

6. By 1991, I was the owner of the 83.32 acres of land patented to my parents.

7. In 2002, I created the Marvin M. Brandt Revocable Trust. A copy of the Trust Agreement is attached hereto as Exhibit A.

8. I am Trustee of the Marvin M. Brandt Revocable Trust.

9. The Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee, are parties in the above captioned matter.

10. In 2002, I deeded the following property to the Marvin M. Brandt Revocable Trust:

> Lots 2,3,4,5,6,7,8,9,10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 31, 34, 35, 37, 38, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60 Fox Park Estates in Government Tract 31, Section 21, Township 13 North, Range 78 West of the 6th P.M., Albany County, Wyoming.

To date, the Marvin M. Brand Revocable Trust continues to own that property. A copy of this deed is attached hereto as Exhibit B.

* * *

Respectfully Submitted By:

/s/ Marvin M. Brandt

Marvin M. Brandt, Trustee
Marvin M. Brandt
Revocable Trust
9 Moose Meadow Road
Fox Park Wyoming 82070-9623
(307) 745-3258

EXHIBI
FOX PAR
TRACT 3
NFSR 517
US
NFSR 517
0.71 acres
NFSR 512
30 acres
PARK
NFSR 512 ROW 123 FT.
NFSR 517 ROW 440 FT.
NFSR 512
USA
Rocky Mountain
MEDICINE BOW NATIONAL FOREST
WYOMING

PETITIONER'S BRIEF

RECORD
AND
BRIEF

No. 12-1173

In The
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST
AND MARVIN M. BRANDT, TRUSTEE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

BRIEF OF PETITIONERS

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QUESTION PRESENTED

This case involves the General Railroad Right-of-Way Act of 1875 ("1875 Act"), under which thousands of miles of rights-of-way exist across the United States. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that 1875 Act rights-of-way are easements and not limited fees with an implied reversionary interest. Based upon the 1875 Act and this Court's decisions, the Federal and Seventh Circuits have concluded that the United States did not retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would continue a circuit split. The question presented is:

Did the United States retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee. Petitioners were defendants in the U.S. District Court for the District of Wyoming and appellants before the U.S. Court of Appeals for the Tenth Circuit. Petitioners are not corporate entities.

Respondent is the United States of America. The United States initiated this action against Petitioners and others, and was the appellee below.

Wyoming and Colorado Railroad Company ("WYCO") is a Utah Corporation and was a defendant below. WYCO did not participate in the Tenth Circuit proceedings.

The other defendants were: Board of County Commissioners, Albany County, Wyoming; DuWayne Keeney; Elizabeth Keeney; Susan Torres; Juan Torres; Bunn Family Trust, Debra R. Hinkel, Trustee; Roger L. Morgan; Daniel K. McNierney; Susan McNierney; Ralph L. Lockhart; Duane King; Patricia King; Marilyn Flint; Marjorie Secrest; Gary Williams; June Williams; Glenna Louise Marrs Trust; Glenna Marrs and Rondal Wayne, Trustees; Kenneth R. Lankford II; Kenneth R. Lankford, Sr.; Patrick R. Rinker; Patricia A. Rinker Flanigin; David Yeutter; Marilyn Yeutter; Snowy Range Properties, LLC; Michael Palmer; Sally Palmer; Ray L. Waits;

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT – Continued

Breazeale Revocable Trust, Vernon H. and Norma J. Breazeale, Trustees; Eugene L. Budnick; Donald Graff; Wanda Graff; Lawrence R. Otterstein; Ginny L. Otterstein; Ronald B. Yeutter; Helen D. Yeutter; Patrick R. Rinker; Lynda L. Rinker; Edmund L. Gruber; Donna Ellen Gruber; Robert S. Pearce; Dorothy M. Pearce; David M. Pearce; Steven M. Pearce; Kathlynn A. Lambert; Steven P. Taffe; Janis A. Taffe; Billy M. Ratliff; and Tobin L. Ratliff. None of these defendants participated in the Tenth Circuit proceedings.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit was not selected for publication in the *Federal Reporter*, is available at 496 Fed. App'x 822, and is reproduced at Petition Appendix ("Pet. App.") 1-9. The opinion of the U.S. District Court for the District of Wyoming was not selected for publication in the *Federal Supplement,* is available at 2008 WL 7185272, and is reproduced at Pet. App. 10-56.

STATEMENT OF JURISDICTION

On March 2 and 3, 2009, the district court entered final judgment against Petitioners. Pet. App. 57-59. On April 29, 2009, Petitioners timely filed a Notice of Appeal. Joint Appendix ("JA") 7. On September 11, 2012, the Tenth Circuit issued a per curiam decision affirming the district court's judgment. Pet. App. 1-9. On October 24, 2012, Petitioners timely filed a petition for rehearing en banc and/or panel rehearing. That petition was denied on December 26, 2012. *Id.* 67-68. The Petition for Writ of Certiorari was timely filed on March 22, 2012, within ninety days of denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The General Railroad Right-of-Way Act of 1875 ("1875 Act"), 18 Stat. 482-83 (1875), is codified at 43 U.S.C. §§ 934-939, and is reproduced at Pet. App. 69-71.

The Act of March 8, 1922, 42 Stat. 414-15 (1922), is codified at 43 U.S.C. § 912, and is reproduced at Pet. App. 72-73.

Relevant portions of Section 3 of the National Trails System Improvements Act of 1988, Pub. L. No. 100-470, § 3, 102 Stat. 2281 (1988), are codified at 16 U.S.C. § 1248(c) and (d), and are reproduced at Pet. App. 74.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND.

A. Railroad Land Grants.

During the mid-1800s, the United States promoted, as national policy, the development and settlement of the public domain in the western United States. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668, 670-77 (1979). In furtherance of this policy, between 1850 and 1871, Congress sought to encourage the private building of railroads through the immense and undeveloped public domain by granting railroads a right-of-way ("ROW") and alternating sections of lands along the ROW. *E.g.*, 1862 Pacific Railway Act, 12 Stat. 489-98 (1862); 1864 Pacific Railway

Act, 13 Stat. 356-65 (1864); 1864 Northern Pacific Railway Act, 13 Stat. 365-72 (1864). This Court originally interpreted pre-1871 railroad ROW grants as conveying a fee simple interest in the land. *Missouri, K. & T. R. Co. v. Roberts*, 152 U.S. 114, 117 (1894) (characterizing the ROW granted by the Act of July 26, 1866, 14 Stat. 289 (1866), as "absolute in terms, covering both the fee and possession"). In 1903, this Court characterized a pre-1871 ROW as a limited fee interest in the land with an implied condition of reverter. *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) ("*Townsend*") (characterizing the ROW grant in the Northern Pacific Act as "a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted").

B. The General Railroad Right-Of-Way Act Of 1875.

Railroad land grants eventually met with public disapproval, and after 1871, Congress changed its policy in favor of homesteaders. Paul W. Gates, *History of Public Land Law Development* 379-81, 396-99, 454-57 (1968); *see Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 868 (1999) (noting that homestead acts were passed in the second half of the 19th century to "encourage the settlement of the West by providing land in fee simple absolute to homesteaders"). For example, on March 11, 1872,

the House of Representatives passed the following Resolution:

> Resolved, that in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the *public lands should be held for the purpose of securing homesteads to actual settlers*, and for educational purposes, as may be provided by law.

Cong. Globe, 42nd Cong., 2d Sess., 1585 (1872) (emphasis added).

Although unwilling to make outright grants of land to railroads, Congress did not wish to stymie the development of a nationwide railroad system. To avoid this problem, Congress passed a number of special acts granting ROWs across the public lands to specific railroads. These acts generally provided for the disposal of lands over which the railroad ROW crossed "subject to" the railroad ROW. *E.g.*, Act of April 12, 1872, 17 Stat. 52 (1872) ("thereafter all lands *over* which the said line of road shall pass shall be sold, located, or disposed of by the United States, *subject to* such right of way so located as aforesaid" (emphasis added)); *see* Cong. Globe, 42nd Cong., 2d Sess., 2136-37 (1872). Finally, in 1875, to avoid the need for special legislation for each new railroad, Congress passed the General Railroad Right-of-Way Act of 1875 ("1875 Act"), 18 Stat. 482-83 (1875) (codified

at 43 U.S.C. §§ 934-939), repealed as to the issuance of new rights-of-way by the Federal Land Policy and Management Act ("FLPMA"), Pub. L. No. 94-579, Title VII § 706(a), 90 Stat. 2743, 2793 (1976).

Section 1 of the 1875 Act provides "[t]he right of way through the public lands of the United States is granted to any railroad company . . . [that has met certain requirements] to the extent of one hundred feet on each side of the central line of said road. . . ." 43 U.S.C. § 934. Section 2 provides "[a]ny railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, *in common with the road first located. . . .*" *Id.* § 935 (emphasis added). Of particular importance is Section 4, which provides: "all such lands *over* which such right of way shall pass shall be disposed of *subject to such right of way.*"[1] 43 U.S.C. § 937 (all emphasis added). Based upon this statutory language, the Department of the Interior ("DOI") interpreted the 1875 Act as granting an easement rather than a fee. *E.g., Fremont, Elkhorn and Missouri Valley Ry. Co.*, 19 L.D. 588, 590 (1894) ("That the

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[1] Section 4 also provides "[t]hat if any section of said *road* shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said *road*." 43 U.S.C. § 937 (all emphasis added).

right of way granted by the [1875 Act] is a mere easement can not [sic] be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way.'" (quoting 43 U.S.C. § 937)). Congress also expressly characterized 1875 Act ROWs as easements in passing acts in 1906 and 1909 to invoke the forfeiture provision in the 1875 Act. Act of June 26, 1906, 34 Stat. 482 (1906); Act of February 25, 1909, 35 Stat. 647 (1909) (codified at 43 U.S.C. § 940).

C. This Court's Decision In *Stringham*.

The understanding that 1875 Act ROWs are easements continued until 1915, when this Court decided *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44 (1915) ("*Stringham*"). That case involved a private dispute between a railroad claiming an 1875 Act ROW against the purchaser of surface rights from the owner of a patented mining claim. *Id.* at 45-46. The railroad prevailed and title to the ROW was quieted in its favor. *Id.* at 46. The railroad ultimately brought a writ of error to this Court asserting that it should have been adjudged the fee simple owner of the land and minerals underlying the railroad ROW. *Id.* at 46. Although this Court affirmed, it made the following statement based upon *Townsend*'s characterization of a pre-1871 ROW grant:

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, *but a limited fee, made on*

> *an implied condition of reverter* in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

Id. at 48 (emphasis added).

D. Congress Reacts To *Stringham*.

The "limited fee" language in *Stringham* raised concerns in Congress as to what to do with the strips of land upon abandonment by a railroad. H.R. Rep. No. 67-217 at 2-3 (1921). Because these strips of land would have "little or no value to the government[,]" *id.*, and because Congress had originally intended to convey the land to homesteaders, Congress passed the Act of March 8, 1922, 42 Stat. 414-15 (1922) (codified at 43 U.S.C. § 912) ("§ 912"). Entitled "An Act To provide for the disposition of abandoned portions of rights of way granted to railroad companies" the Act was passed to dispose of any interest that the United States may still possess at the time a ROW was abandoned. Specifically, the Act provides: "[w]henever public lands of the United States have been or may be granted to any railroad company for use as a right of way . . . ," if that use should cease, "whether by forfeiture or by abandonment . . . declared or decreed by a court of competent jurisdiction . . . , then all right, title, interest, and estate of the United States in said lands shall . . . be transferred to" the person to whom title of the whole of the legal subdivision traversed by the railroad had been

conveyed "and this by virtue of the patent thereto[,]" except such part of the ROW that may be embraced in a public highway established within one year after the declaration or decree of forfeiture or abandonment. *Id.* The Act further provides that the transfer of such lands "shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land. ." *Id.*

E. This Court Rules That 1875 Act ROWs Are Easements.

In *Great Northern Ry. Co. v. United States*, 315 U.S. 270 (1942), the United States sought a determination of the nature and scope of 1875 Act ROWs. Based upon the text of the Act, Congress's shift in policy in 1871, the DOI's early interpretation of the 1875 Act, and similar constructions by Congress as reflected in subsequent legislation, the United States argued that 1875 Act ROWs are only easements that conveyed no right to the minerals underlying the ROW. Brief for the United States, *Great Northern Ry. Co. v. United States*, No. 149, 1942 WL 54245, **9-35.

This Court emphatically agreed with the United States' easement argument and ruled that 1875 Act ROWs are easements. *Great Northern*, 315 U.S. at 271 ("The [1875] Act . . . clearly grants only an easement, and not a fee."). This Court also rejected the statement in *Stringham* that 1875 Act ROWs were "limited fee[s], made on an implied condition of reverter":

> The conclusion that the railroad was the owner of a 'limited fee' was based on cases arising under the land-grant acts passed prior to 1871 and it does not appear that Congress's change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the [1875] Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling.

Id. at 279 (footnote omitted). Fifteen years later, this Court reaffirmed its ruling in *Great Northern*. *United States v. Union Pacific R. Co.*, 353 U.S. 112, 119 (1957) ("*Union Pacific*") (In *Great Northern* "we noted that a great shift in congressional policy occurred in 1871 [and] after that period only an easement for railroad purposes was granted. . . .").

F. The National Trails System Improvements Act Of 1988.

Great Northern and *Union Pacific* established a clear demarcation of the respective property interests associated with 1875 Act ROWs. Following those decisions, litigation over the nature and scope of 1875 Act ROWs was essentially nonexistent, until 1983 when Congress passed what is commonly referred to as the "Rails-to-Trails Act" in an effort to transform abandoned railroad ROWs into recreational trails. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42 (1983) (codified at 16

U.S.C. §§ 1241-1251); *Preseault v. I.C.C.*, 494 U.S. 1, 6-9 (1990) ("*Preseault I*") (explaining operation of the Rails-to-Trails Act). Although laudable, that goal has often clashed with private property interests. *Preseault v. United States*, 100 F.3d 1525, 1549-53 (Fed. Cir. 1996) (en banc) ("*Preseault II*") (Rails-to-Trails Act effectuated a taking by preventing abandoned railroad ROWs from unburdening private land). Five years later, Congress passed the National Trails System Improvements Act of 1988, Pub. L. No. 100-470, 102 Stat. 2281 (1988). Section 3 of that Act provides, in relevant part:

> Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in [43 U.S.C. § 912], shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

16 U.S.C. § 1248(c). This provision had its critics, and some federal officials expressed concern over whether the United States retained any interest in abandoned railroad ROWs. *E.g.*, S. Rep. No. 100-408 at 15 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 2607, 2617 (Director of the National Park Service explaining "we are concerned . . . that the Federal Government could be placed in the position of asserting title to that which it no longer owns, thus creating an issue of a potential

taking by the Federal Government of private property.").

II. PROCEEDINGS BELOW.

In 1908, the Laramie, Hahn's Peak & Pacific Railway Company was granted an 1875 Act ROW. Pet. App. 13. The grant was for a 200-foot-wide ROW approximately 66 miles in length, which ran from Laramie, Wyoming south to the Wyoming-Colorado border. *See* Pet. App. 13.

On February 18, 1976, the United States patented approximately 83.32 acres of land, commonly referred to as Fox Park, Wyoming, to Melvin M. and Lulu M. Brandt, parents of Marvin M. Brandt.[2] Pet. App. 76-78. The patent was issued pursuant to the General Exchange Act, 16 U.S.C. §§ 485-86.[3] Pet. App. 76. The patented land is surrounded by what is now referred to as the Medicine Bow-Routt National Forest, and is essentially bisected by the above-described 1875 Act

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[2] Marvin M. Brandt's father began working at the Fox Park sawmill in 1939, and took over ownership and operation of the sawmill in 1944. Joint Appendix ("JA") 19. Marvin M. Brandt, began working at the sawmill in 1958 and later operated the sawmill from 1976 until he closed it in 1991. *Id.*

[3] The General Exchange Act provides: "the Secretary of Agriculture is authorized . . to accept on behalf of the United States title to any lands within the exterior boundaries of the national forests . . . , and in exchange therefor may patent not to exceed an *equal value* of such national-forest land. . . " 16 U.S.C. § 485 (emphasis added).

ROW.[4] Pet. App. 11-13; JA 21 (depicting patented land). Although the Patent expressly reserves ROWs for ditches and canals and for two Forest Service roads, it does not reserve any interest in the 1875 Act ROW. Pet. App. 76-78. Instead, the Patent simply provides that the patented land is: "SUBJECT TO *those rights for railroad purposes* as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns . . . under the Act of March 3, 1875, 43 U.S.C. 934-939." Pet. App. 78 (emphasis added). Most of the patented land, including all of the patented land burdened by the 1875 Act ROW, is currently owned by Petitioners, Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee (collectively "Brandt"). JA 19-20.

In 1987, the Wyoming and Colorado Railroad Company, Inc. ("WYCO") acquired the 1875 Act ROW. Pet. App. 13. On May 15, 1996, WYCO filed a Notice of Intent to Abandon Rail Service with the Surface Transportation Board ("STB") seeking to abandon the 1875 Act ROW including the portion that traversed Brandt's property. *Id.* On December 31, 2003, the STB approved abandonment of the 1875 Act ROW, and, on January 15, 2004, WYCO notified the STB that it had consummated abandonment. *Id.* 13-14.

On July 14, 2006, the United States filed suit in the U.S. District Court for the District of Wyoming seeking a judicial decree of abandonment under

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[4] The 1875 Act ROW covers approximately 10 acres of the 83.32 acres patented. *See* JA 21; Pet. App. 76.

§ 912, for approximately 28 miles of the 1875 Act ROW that was within the National Forest. Pet. App. 10-11. The United States also sought to quiet title against Brandt and approximately 50 other private landowners over whose lands a portion of the 1875 Act ROW crossed.[5] *See* Pet. App. 11-12. The United States alleged that the 1875 Act ROW was the type of ROW described in § 912. Dist. Ct. Dkt. No. 105 at 11-12. The United States also alleged that, pursuant to 16 U.S.C. § 1248(c), any interest of the United States remaining in the 1875 Act ROW would be retained by the United States upon a judicial decree of abandonment. *Id.*

Brandt answered and filed a counterclaim seeking to quiet title to the abandoned 1875 Act ROW.[6]

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[5] The United States also sued WYCO, which stipulated to the entry of judgment that it had abandoned the relevant segment of the 1875 Act ROW. Pet. App. 60-61; JA 14. The United States either settled with, or obtained default judgments against, all the landowners, except Brandt. Brief for the United States ("U.S. Br.") at 4.

[6] Brandt also sought to quiet title to the Forest Service road easements that burden his property. *See* Pet. App. 31-56. That claim is not at issue here. Brandt also counterclaimed for just compensation if the district court were to hold that the United States acquired some kind of property interest in the abandoned 1875 Act ROW under 16 U.S.C. § 1248(c). This counterclaim was dismissed without prejudice. Pet. App. 62-66. After final judgment by the district court, Brandt filed a takings claim in the Court of Federal Claims. That case is currently stayed in the Court of Federal Claims pending the outcome of this case. *Brandt v. United States*, No. 09-265; *see Brandt v. United States*, 102 Fed. Cl. 72 (2011), *rev'd*, 710 F.3d 1369 (Fed. Cir. 2013).

See Pet. App. 12. Brandt argued, *inter alia*, that, under this Court's decision in *Great Northern*, the 1875 Act ROW was an easement and not a limited fee with an implied reversionary interest held by the United States. Because neither the 1875 Act nor the Patent expressly reserved any interest in the ROW, Brandt acquired fee title to the patented land "subject to" the railroad easement. *Id.* And, upon abandonment, Brandt's property became unburdened by the 1875 Act ROW. *Id.* In support of that argument, Brandt relied primarily on two recent decisions applying *Great Northern*, both of which held that 1875 Act ROWs are easements and that the United States did not retain implied reversionary interests in 1875 Act ROWs after the underlying lands were patented. *Hash v. United States*, 403 F.3d 1308, 1316-17 (Fed. Cir. 2005); *Beres v. United States*, 64 Fed. Cl. 403, 427-28 (2005).

On April 8, 2008, the district court ruled in favor of the United States. Pet. App. 13-30. The district court noted that it was required to follow the Tenth Circuit's decision in *Marshall v. Chicago & N.W. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994), which had ruled that § 912 applied to 1875 Act ROWs. Pet. App. 26-27. Based upon *Marshall* and 16 U.S.C. § 1248(c), the district court then ruled that the United States retained an implied reversionary interest in the 1875 Act ROW upon abandonment. Pet. App. 29-30.

Almost one year later, the district court entered judgment in favor of the United States and against Brandt. Pet. App. 57-59. That judgment provides, in

relevant part, that: (i) the 1875 Act ROW, where it traverses Brandt's property, has been abandoned; (ii) the United States retained a reversionary interest in the ROW; (iii) as a result of the abandonment, title to the ROW is "hereby vested and quieted in the United States"; and (iv) fee title to the underlying land and minerals remains with Brandt, subject to the rights of the United States in the ROW. *Id.* Although not pleaded, argued, or proven by the United States, that judgment also provides: "[t]hat the interest quieted and vested in the United States includes the right to construct and operate a *recreational trail* on the railroad right-of-way[.]" *Id.* at 59 (emphasis added).

On April 29, 2009, Brandt appealed. JA 7. On September 11, 2012, the Tenth Circuit issued a per curiam decision affirming the district court's judgment. Pet. App. 1-9. Based upon *Marshall*, the Tenth Circuit ruled that § 912 applied to 1875 Act ROWs, the United States had an implied reversionary interest in the 1875 Act ROW and, upon the judicial decree of abandonment, the United States retained that implied reversionary interest through operation of 16 U.S.C. § 1248(c). Pet. App. 3-6.

SUMMARY OF ARGUMENT

The United States does not retain an implied reversionary interest in 1875 Act ROWs after the underlying lands are patented. The 1875 Act granted an easement, not a limited fee with an implied

reversionary interest in favor of the United States. In *Great Northern*, based upon the language of the 1875 Act, the history surrounding its passage, the DOI's early interpretation of the Act, and Congress's subsequent construction of the Act, this Court unconditionally ruled that 1875 Act ROWs are easements. Fifteen years later, in *Union Pacific*, this Court reaffirmed that ruling.

It was against this legal background that the United States issued the Patent in 1976. The Patent conveyed fee simple title to the land "subject to those rights for railroad purposes" granted under the 1875 Act. The "subject to" clause merely advised that the patented land was burdened by an easement "for railroad purposes." When a grantor, such as the United States, conveys fee simple title to land burdened by an easement the grantor does not retain an implied reversionary interest in the easement. Accordingly, when the 1875 Act ROW was abandoned, the railroad easement was extinguished and Brandt's land became unburdened. These principles alone demonstrate that the Tenth Circuit erred.

Even if these principles were not sufficient, Brandt should have prevailed on the strength of his Patent. A patent from the United States is the highest evidence of title. When the United States issued the Patent, it did not reserve any interest in the 1875 Act ROW, although it could have done so. In *Leo Sheep*, this Court reiterated the cardinal principle that the United States does not retain any property interests not expressly reserved in the patent, granting

statute, or regulations. Nothing in the Patent, the 1875 Act, or the applicable DOI regulation suggested that an implied reversionary interest may be lurking in favor of the United States. The Tenth Circuit's finding of an implied reversionary interest not only violated the sanctity of Brandt's Patent, it upset the settled expectations of thousands of landowners who trace their title to patents issued by the United States "subject to" 1875 Act ROWs.

The implied reversionary interest found by the Tenth Circuit simply does not exist. It is not in the 1875 Act, the applicable DOI regulation, or Brandt's Patent. Instead, the Tenth Circuit created the implied reversionary interest from § 912, an act passed 47 years after the 1875 Act. This act did not amend the 1875 Act. Nor did it alter previously granted ROWs to include an implied reversionary interest. Instead, the language and history surrounding § 912 confirms that Congress originally intended to grant only easements to railroads under the 1875 Act. Based upon the inaccurate statement in *Stringham* that 1875 Act ROWs were limited fees, Congress mistakenly believed that the United States would be saddled with worthless strips of land as 1875 Act ROWs were abandoned. Accordingly, Congress passed § 912 to more closely effectuate Congress's original intent in passing the 1875 Act, *i.e.*, to ensure that homesteaders received all the land described in their patents, including 1875 Act ROWs upon abandonment. The Tenth Circuit's finding of an implied reversionary interest in 1875 Act ROWs completely frustrates

Congress's intent in passing the 1875 Act, as reflected in both the 1875 Act and § 912.

ARGUMENT

I. THE 1875 ACT GRANTED ONLY AN EASEMENT AND UPON ABANDONMENT THE UNDERLYING PATENTED LAND BECOMES UNBURDENED.

A. In *Great Northern*, This Court Unmistakably Ruled That 1875 Act ROWs Are Easements.

In *Great Northern*, the United States filed suit to "obtain a determination of the nature and scope of the grant made by the [1875 Act]." Brief for the United States, 1942 WL 54245, **8-9. The United States sought an answer to that question by seeking to enjoin a railroad from drilling for oil and gas on a portion of an 1875 Act ROW that crossed public lands. *United States v. Great N. Ry. Co.*, 32 F. Supp. 651, 652 (D. Mont. 1940). According to the district court, the United States argued that the 1875 Act granted "*only an easement*, or right to cross public lands of the United States, with no right whatever to the oils and minerals underlying the surface." *Id.* (emphasis added). The railroad defended by arguing that it had a right to the oil and gas because the 1875 Act ROW was a limited fee made on an implied condition of reverter that conveyed the underlying lands and minerals to the railroad. *Id.* The district court agreed with the United States' easement argument

and enjoined the railroad from drilling. *Id.* at 653-55. On appeal, the Ninth Circuit affirmed. *MacDonald v. United States*, 119 F.2d 821 (9th Cir. 1941).

Before this Court, the United States defended the judgment on two different grounds. The United States' primary argument was that the 1875 Act granted only an easement. Brief for the United States, 1942 WL 54245, **4-8. The United States supported its easement argument with the plain language of the 1875 Act, Congress's shift in policy in 1871, the DOI's interpretation of the Act, and Congress's subsequent interpretations of the 1875 Act. *Id.* **10-35. In the alternative, the United States argued that, if the 1875 Act granted a "limited fee," that interest included only "a 'fee' in the surface and so much of the subsurface as is necessary for support – a 'fee' for a railroad thoroughfare exclusively." *Id.* at 35-37. This Court unconditionally adopted the United States' easement argument. *Great Northern*, 315 U.S. at 271-77.

First, this Court looked at the plain language of the 1875 Act. This Court noted that Section 4 of the 1875 Act confirmed that only an easement was intended. *Id.* at 271-72. This section, codified at 43 U.S.C. § 937, required the DOI to note the location of 1875 Act ROWs on the plats in the local land office "and thereafter all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way. . . ." 43 U.S.C. § 937 (all emphasis

added).[7] This language was "especially persuasive" because the subsequent patenting of land "subject to" a ROW would be "wholly inconsistent with the grant of a fee." *Great Northern*, 315 U.S. at 271. In fact, this Court stressed that "'[a]pter words to indicate the intent to convey an easement would be difficult to find[.]'" *Id.* (quoting *MacDonald*, 119 F.2d at 825).

Second, this Court recognized that the 1875 Act is to be liberally construed to carry out its purposes, but that the Act is also subject to the rule of construction that nothing passes in a federal grant except that which is conveyed in clear and explicit language. *Great Northern*, 315 U.S. at 272. Because the purpose of the 1875 Act – "to permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement" – could be satisfied by an easement for railroad purposes, construing the Act as conveying a fee was not necessary. *Id.* ("[A] railroad may be operated though its right of way be but an easement.").

Third, this Court followed the canon of construction that public land statutes must be interpreted in light of the circumstances when they were passed. *Id.* at 273 ("The Act was the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.'"

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[7] This language first appeared in the Act of April 12, 1872, 17 Stat. 52 (1872) and the legislative history of that Act showed that only an easement was intended. Brief for the United States, 1942 WL 54245, **11-12; *Great Northern*, 315 U.S. at 271 n.3.

(quoting *United States v. Union Pac. R. Co.*, 91 U.S. 72, 79 (1875))). This Court then traced the history of railroad acts and confirmed that the 1875 Act was a "product of the sharp change in Congressional policy with respect to railroad grants after 1871. . . ." *Great Northern*, 315 U.S. at 275. Because of this "sharp change" this Court found it "improbable" that Congress intended "to grant more than a *right of passage*, let alone mineral riches." *Id.* at 275 (emphasis added). This Court further noted that "[t]he presence in the Act of Section 4, which . . . *is so inconsistent with the grant of a fee*, strongly indicates that Congress was carrying into effect its changed policy regarding railroad grants." *Id.* (emphasis added).

Fourth, this Court looked at the interpretation of the 1875 Act by the DOI, *i.e.*, the agency charged with administering the Act. *Id.* at 275-76. Although the DOI's first formal interpretation was not issued until 13 years after the Act's passage, this Court found it highly convincing that the 1875 Act conveyed only an easement:

> "The act of March 3, 1875 is not in the nature of a grant of lands; it does not convey an estate in fee either *in the 'right of way'* or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.
>
> * * *
>
> All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and

> must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases."

Id. at 275 n.13 (emphasis added) (quoting *Right of Way-Railroads-Act of March 3, 1875,* 12 L.D. 423, 428 (1888)). While the DOI's interpretation of the 1875 Act had deviated on occasion, this Court downplayed that because those changes were precipitated by "inaccurate statements in the *Stringham* case." *Great Northern*, 315 U.S. at 276.

Finally, this Court observed that subsequent legislation confirmed that 1875 Act ROWs were easements. This Court noted that Congress expressly characterized 1875 Act ROWs as easements in the forfeiture acts of 1906 and 1909. *Id.* This Court also referenced the Act of June 26, 1906, 34 Stat. 481 (1906) (codified at 43 U.S.C. § 944), which extended application of the 1875 Act to the Territories of Oklahoma and Arizona. *Great Northern*, 315 U.S. at 276-77. This Court found it very compelling that both the language of the Act and its legislative history expressly characterized 1875 Act ROWs as easements:

> "The right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes. Under the present law whenever the railroad passes through a tract of public land the entire tract is patented to the settler or entryman, subject only to this easement."

Id. at 276-77 (quoting H.R. Rep. No. 59-4777 at 2 (1906)).

Based upon these factors, this Court ruled "[t]hat [the railroad] has only an easement in its rights of way acquired under the Act of 1875 is therefore clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments." *Id.* at 277.

This Court then addressed the railroad's argument that it had a "limited fee" in the lands and minerals within the 1875 Act ROW. *Id.* This Court noted that most of the cases relied on by the railroad involved railroad acts that were passed prior to 1871. *Id.* at 277-78. Because of the shift in Congress's policy in 1871, this Court ruled those cases were "not controlling." *Id.* at 278. Moreover, because the shift in policy was not brought to the Court's attention in *Stringham*, this Court ruled that *Stringham* and its progeny, *Choctaw, O. & G. R.R. Co. v. Mackey*, 256 U.S. 531 (1921) and *Noble v. Oklahoma City*, 297 U.S. 481 (1936), which characterized 1875 Act ROWs as "limited fees," were entitled to no weight. *Great Northern*, 315 U.S. at 279. Instead, this Court found "[f]ar more persuasive" two cases that had interpreted post-1871 ROW acts as conveying only an easement. *Great Northern*, 315 U.S. at 279 (citing *Denver & R.G. Railway Co. v. Alling*, 99 U.S. 463, 475 (1878) ("a present beneficial easement") and *Smith v. Townsend*, 148 U.S. 490, 498 (1893) ("simply an easement, not a fee in the land")). Accordingly, this Court reiterated "[s]ince petitioner's right of way *is but an easement*, it has no right to the underlying oil and

minerals." *Great Northern*, 315 U.S. at 279 (emphasis added). By rejecting the railroad's "limited fee" argument and using the term "easement" again, this Court left no doubt that 1875 Act ROWs are easements. *Cf. New Mexico v. U.S. Trust Co. of New York*, 172 U.S. 171, 182 (1898) ("The difference between an easement and the fee would not have escaped [the] attention . . . of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference.").[*]

Because of the unmistakable clarity of this Court's ruling – that 1875 Act ROWs are easements – *Great Northern* is a landmark decision. It immediately established the respective rights between railroads and the United States involving 1875 Act ROWs that crossed public lands. It also set the framework for the Tenth Circuit's holding that 1875 Act ROWs were easements in disputes not involving the United States. *Missouri-Kansas-Texas R. Co. v. Ray*, 177 F.2d 454, 455-57 (10th Cir. 1949) (Relying on *Great Northern* to hold that where a railroad

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[*] Because this Court knew the difference between an easement and a fee, its ruling in *Great Northern* eliminated any notion that the United States would retain an implied reversionary interest in 1875 Act ROWs after the underlying lands were patented. *See Preseault*, 100 F.3d at 1533 (under the common law, a reversionary interest does not exist in easement); *Nat'l Wildlife Fed'n v. I.C.C.*, 850 F.2d 694, 703 n.13 (D.C. Cir. 1988) ("Because an easement is a servitude, rather than an estate in land, it is not strictly accurate to speak of an easement 'reverting'; rather, such interests 'lapse' or are 'extinguished.'").

acquired a ROW across school trust lands through territorial condemnation proceedings provided by 43 U.S.C. § 944, it acquired no greater interest than that allowed by the 1875 Act, *i.e.*, an easement, notwithstanding that the railroad may have paid for a fee.); *Himonas v. Denver & R.G.W.R. Co.*, 179 F.2d 171, 172 (10th Cir. 1949) ("By the grant under the [1875 Act], the [railroad] acquired only an easement for railroad purposes. . . . The fee or servient estate remained in the United States."). *Great Northern* also reestablished that ROWs for reservoirs and ditches granted under the Act of March 3, 1891, 26 Stat. 1095, 1101-02 (1891) (codified at 43 U.S.C. §§ 946-949), were easements rather than limited fees. Solicitor's Opinion M-36597, 67 I.D. 225 (1960) ("Since the reservoir right-of-way act of March 3, 1891, is comparable to railroad right-of-way acts passed subsequent to 1871, they too are now regarded as easements."). It also reestablished that mining claims could be located over 1875 Act ROWs. David G. Ebner, *Mineral Ownership Beneath Railroad Rights-Of-Way*, 31 RMMLF-INST 17-1, 17-27 (1985) ("Under the pure easement theory now associated with railroad rights-of-way granted under post-1871 acts and reservoir rights-of-way granted under the 1891 Reservoir Act, mining claims may freely be located on public lands traversed by these particular rights-of-way, so long as the lands are otherwise open to mineral entry and location.").

B. In *Union Pacific*, This Court Reaffirmed That 1875 Act ROWs Are Easements.

In 1957, this Court reaffirmed that 1875 Act ROWs are easements in *Union Pacific*. In that case, the United States sued to enjoin a railroad from drilling on its pre-1871 ROW grant to extract the underlying oil and gas. *Union Pacific*, 353 U.S. at 113. The district court ruled that the railroad's interest in the ROW was a limited fee that granted the railroad the right to underlying oil and gas, as long as the ROW was otherwise used for railroad purposes. *United States v. Union Pac. R. Co.*, 126 F. Supp. 646, 647-48 (D. Wyo. 1954). On appeal, the Tenth Circuit affirmed, based upon this Court's earlier cases construing pre-1871 railroad acts as conveying a limited fee in the land and minerals within the ROWs. *United States v. Union Pac. R. Co.*, 230 F.2d 690, 692-94 (10th Cir. 1956).

After granting certiorari, this Court held that the railroad did not have the right to extract the oil and gas underlying the ROW. *Union Pacific*, 353 U.S. at 113-20. This Court's holding was based on three grounds. First, drilling for oil and gas beneath the railroad ROW was not a "railroad purpose" within the meaning of the 1862 Pacific Railway Act. *Id.* at 113-14. Second, because Section 3 of the Act excepted "mineral lands" from the grant of "every alternate section of public land," this Court concluded that that exception should apply to all parts of the Act, including Section 2 that contained the ROW grant. *Id.* at 114-15. Finally, this Court noted that a ruling in favor

of the railroad would frustrate the policy of the United States in the 1860s to reserve minerals. *Id.* at 115-16.

In rejecting the railroad's argument that pre-1871 ROW grants conveyed a limited fee in all the land and minerals underlying the ROW, this Court noted: "[t]he most that the 'limited fee' cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes." *Id.* at 119. This Court then favorably acknowledged *Great Northern*'s ruling that a "great shift in congressional policy occurred in 1871[,]" and "after that period only an easement for railroad purposes was granted. . . ." *Id.* This Court went on to state, with regards to pre-1871 ROWs, that "the suggestion [in Great Northern] that a right of way may at times be more than an easement, was made in an effort to distinguish the earlier 'limited fee' cases." *Id.* This Court also remarked that "'[n]one of the [limited fee] cases involved the problem of rights to subsurface oil and minerals.'" *Id.* (quoting *Great Northern*, 315 U.S. at 278). Thus, in rejecting the railroad's argument for ownership of the underlying oil and gas, this Court lessened the scope of the limited fees conveyed by pre-1871 ROW grants.[9] But,

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[9] The 1864 Pacific Railway Act excluded "coal and iron" from the "mineral lands" exception in Section 3 of the 1862 Act. 13 Stat. at 358. Thus, following *Union Pacific*, the railroad retained the right to develop the coal and iron, but not the oil and gas and other minerals underlying the ROW. *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967) ("*Udall*"). The right to

(Continued on following page)

in so doing, this Court expressly reinforced the ruling in *Great Northern* that 1875 Act ROWs are easements. *See Chicago & N. W. Ry. Co. v. Continental Oil Co.*, 253 F.2d 468, 470-71 (10th Cir. 1958) ("*Continental Oil*") (noting "the decisional force" of *Great Northern*'s ruling that 1875 Act ROWs are easements survived *Union Pacific*); *Udall*, 379 F.2d at 640 (*Union Pacific* "did not overrule *Townsend*" and "[i]t recognized that under *Great Northern* the post-1871 grants were of an easement.").

C. The Department of the Interior Interpreted 1875 Act ROWs As Easements.

At the time of Brandt's Patent, the applicable DOI regulation defined 1875 Act ROWs as easements:

> A railroad company to which a right-of-way is granted does not secure a full and complete title to the land on which the right-of-way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys *the fee simple title in the land over which the right-of-way is granted* to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee

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the coal and iron places this pre-1871 ROW grant "in a different category from a surface easement." *Id.*

> *takes the fee subject only to the railroad company's right of use and possession.* All persons settling on a tract of public land, to part of which right-of-way has attached, take the same subject to such right-of-way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases.

43 C.F.R. § 2842.1(a) (1976) (all emphasis added); *see Wyoming v. Andrus*, 602 F.2d 1379, 1383-84 (10th Cir. 1979) ("*Andrus*") ("43 C.F.R. § 2842.1(a) . . . declares that the grantee takes the fee interest in the entire legal subdivision subject only to the railroad's right of use and possession. It is unquestionably applicable to the grants to railroads pursuant to the 1875 Act.").

This easement language is identical to that which the DOI promulgated in 1909, *Right-of-Way Railroads*, 37 L.D. 787, 788 (1909), and that this Court in *Great Northern* relied on in ruling that 1875 Act ROWs are easements. 315 U.S. at 276. In 1938, this easement language was codified as 43 C.F.R. § 243.2 (1938); *see State of Wyoming*, 27 IBLA 137, 173 n.18 (1976) (Frishberg, Chief A.J., dissenting) (noting that 43 C.F.R. § 243.2 (1938) "reasserted the easement language of the May 21, 1909, regulations"). In 1970, this easement language was recodified as 43 C.F.R. § 2842.1(a). 35 Fed. Reg. 9,502, 9,649 (June 13, 1970). Although this regulation was ultimately rescinded in 1980 after passage of FLPMA, *see* 45 Fed. Reg. 44,518 (July 1, 1980), it had the force and effect of law until that time. *United States v.*

Nixon, 418 U.S. 683, 695 (1974) ("So long as [a] regulation is extant it has the force of law."); *see McLaren v. Fleischer*, 256 U.S. 477, 481 (1921) (The DOI's interpretation of a public land law "is entitled to great respect and, if acted upon for a number of years will not be disturbed except for cogent reasons.").

It was against this legal backdrop that Brandt's parents negotiated the land exchange that resulted in them, and now Brandt, owning the land "subject to those rights for railroad purposes" granted under the 1875 Act ROW. At that time, the 1875 Act, this Court's rulings, and the extant DOI regulation all defined the 1875 Act ROW as an easement.[10] Although it could have done so, the United States did not expressly reserve any rights in the 1875 Act ROW.[11] *See* Pet. App. 76-79. Thus, the intent of the parties to the exchange was clear – the 1875 Act ROW was an easement in which the United States retained no reversionary interest. That Brandt is entitled to rely on the security that his Patent provided cannot be

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[10] Two months after issuing the Patent, the DOI reaffirmed that 1875 Act ROWs are easements. *Amerada Hess Corp.*, 24 IBLA 360, 365-79 (1976) (ruling that an 1875 Act ROW is an easement and the United States did not impliedly reserve the mineral estate underlying the ROW when land was patented).

[11] In authorizing exchanges, Congress did not intend for there to be any implied reservations because that would have made valuation of the properties to be exchanged impossible. *See* 16 U.S.C. § 486 ("Either party to an exchange may make reservations of timber, minerals, or easements, *the values of which shall be duly considered* in determining the values of the exchanged lands." (emphasis added)).

questioned. *Grainger v. United States*, 197 Ct. Cl. 1018, 1024 (1972) (A "patent is intended to quiet title to and secure the enjoyment of the land for the patentees and their successors.") (citing *Dominguez De Guyer v. Banning*, 167 U.S. 723, 743-44 (1897)); *see Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) (New interpretations by the United States as to the scope of mineral reservations "arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions.").

D. When An 1875 Act ROW Is Abandoned, The Underlying Patented Land Is No Longer Burdened By The Easement.

There is no doubt that Congress's intent controls the interpretation of the 1875 Act. *Missouri, K. and T. R. Co. v. Kansas Pac. R. Co.*, 97 U.S. 491, 497 (1878) ("It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress."). Yet, common law principles are still important. *Shaw v. Merchants' Nat'l Bank*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."). Nothing in the language of the 1875 Act suggests that 1875 Act ROWs are anything but common

law easements. *See Great Northern*, 315 U.S. at 279 (looking at Section 4 of the 1875 Act and stressing "'[a]pter words to indicate the intent to convey an easement would be difficult to find[.]'" (quoting *MacDonald*, 119 F.2d at 825)); Brief of the United States 1942 WL 54245, *12 ("The 1875 Act becomes a harmonious whole if Section 1 be construed as conferring on the railroads an easement; to construe it as granting a fee would be to deprive . . . Section 4 of all meaningful content."). Application of common law principles is therefore appropriate. *Cf. Amoco*, 526 U.S. at 877 (using state common law principles to assist in interpreting a federal statutory mineral reservation).

It is axiomatic that when a landowner, such as the United States, grants an easement across its lands it does not retain a reversionary interest in the easement, but merely retains the underlying fee burdened by the easement. *Preseault II*, 100 F.3d at 1533 (When a fee owner conveys an easement across its land, the fee owner retains "a present estate in fee simple, *subject to* the burden of the easement." (emphasis added)). When the easement is abandoned, the underlying fee becomes unburdened. *Id.* at 1545 (citing *Restatement (First) of Property* § 504 (1944)); *Samuel C. Johnson 1988 Trust v. Bayfield Cnty., Wis.*, 649 F.3d 799, 803 (7th Cir. 2011) ("[T]he termination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement." (citing *Restatement (Third) of Property (Servitudes)* § 7.4,

Comments a, c, f (2000))). Moreover, if the underlying fee is conveyed before abandonment, the grantee steps into the shoes of the grantor and is entitled to an unburdened fee upon abandonment. *See* Sharon J. Bell, *Osages, Iron Horses and Reversionary Interests: The Impact of United States v. Atterberry on Railroad Abandonments*, 20 Tulsa L.J. 255, 275-76 (1984) ("Unless there is an expressed reversionary interest in the deed in favor of the original grantor, the common law assumes that a conveyance of the servient estate is also a conveyance of the reversionary interest in the easement."); *cf. United States v. Magnolia Petroleum Co.*, 110 F.2d 212, 217 (10th Cir. 1939) ("It is the general rule that the servient estate in a strip of land set apart for a railroad . . . passes with a conveyance of the fee to the abutting . . . tract out of which the strip . . . was carved *even though no express provision to that effect is contained in the instrument of conveyance*, and that on the abandonment of the strip . . . the dominant estate becomes extinguished and the entire title and estate vests in the owner of such abutting . . . tract." (emphasis added)).

The Patent in this case – like hundreds of other patents – conveyed fee simple title to the underlying land "subject to those rights for railroad purposes" granted under the 1875 Act. Pet. App. 78; *See* Brief for the United States, 1942 WL 54245, *23 n.27 ("Patents issued to settlers on lands crossed by railroad [ROWs] have consistently included the entire legal subdivision, generally with a notation that is was issued 'subject to' the [ROW]."). The "subject to"

clause did not reserve an interest in the United States; it merely advised that the patented land was burdened by an easement for railroad purposes. *Smith v. Townsend*, 148 U.S. at 499 (Interpreting post-1871 ROW grant and concluding, "[d]oubtless whoever obtained title from the government . . . through which ran this right of way would acquire a fee to the whole tract, *subject to the easement* of the company; and if ever the use of that right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land." (emphasis added)); 43 C.F.R. § 2842.1(a) (1976) ("the patentee takes the fee subject only to the railroad company's right of *use and possession*" (emphasis added)); *see Restatement (Third) of Property (Servitudes)* § 2.2, Comment d (2000) ("If the land conveyed was already burdened by . . . a servitude, the 'subject to' language is often included to qualify the grantor's covenant against encumbrances, rather than to create a new servitude."). When the railroad ultimately abandoned the 1875 Act ROW, Brandt's property was no longer burdened by the easement. *City of Aberdeen v. Chicago & N. W. Transp. Co.*, 602 F. Supp. 589, 593 (D.S.D. 1984) ("As a mere easement, once a railroad ceases using for railroad purposes a right-of-way granted after 1871, it disappears and the underlying landowner has the *use* of property he already *owns*." (emphasis in original)); *see* 16 Op. Atty. Gen. 250, 254 (1879) (The "grantees of the United States took the fee of the lands patented to them subject to the easement created by the act of 1824; but on a discontinuance or

abandonment of that right of way the entire and exclusive property, and right of enjoyment thereto, vested in the proprietors of the soil.").

Based upon *Great Northern*, *Union Pacific*, the DOI's then-existing regulation, and Brandt's Patent, the underlying land became unburdened upon abandonment of the 1875 Act ROW. Accordingly, the decision of the Tenth Circuit should be reversed.

II. THE UNITED STATES DID NOT RETAIN AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS AFTER THE UNDERLYING LANDS WERE PATENTED.

The Tenth Circuit summarily rejected the above analysis and held that the United States retained an implied reversionary interest in the 1875 Act ROW after the underlying land was patented. Pet. App. 5. This implied reversionary interest, however, does not exist. It cannot be found in the 1875 Act, the applicable DOI regulation, or Brandt's Patent. Instead, the Tenth Circuit's holding is premised on: (1) the United States' new interpretation of the 1875 Act; (2) a statute passed in 1922 when Congress was under the mistaken belief that 1875 Act ROWs were limited fees; and (3) dubious authorities that cannot withstand scrutiny under this Court's precedent.

A. The Finding Of An Implied Reversionary Interest In 1875 Act ROWs Would Negate the Security Of Title Provided By Patents Issued By The United States.

"A patent is the highest evidence of title, and is conclusive as against the Government. . . ." *United States v. Stone*, 69 U.S. 525, 535 (1864); *Moore v. Robbins*, 96 U.S. 530, 533 (1877) (When a "patent issued under the seal of the United States . . . is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed."). Because of the sanctity of patents, this Court has rejected the idea that the United States could retain property interests not expressly reserved in the patent, granting statute, or regulations. *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 331 (1924) ("[I]t is true as a general rule, that when . . . entry is made and certificate given, the land covered ceased to be a part of the public lands, and that, when a patent issues in accordance with governing statutes, all title and control of the land passes from the United States . . . subject to the regulations then in force. . . ."); *Work v. State of Louisiana*, 269 U.S. 250, 255 (1925) (refusing to find an implied mineral reservation in the swamp-land acts); *see Hash*, 403 F.3d at 1315-16 ("The Court has consistently preserved the integrity of the land grant patent, in its review and application of the statutes before and after the 1875 Act. Throughout its resolution of

various disputes, the Court has required that unless a property interest was expressly reserved by the government, whether in the patent grant or by statute or regulation then in effect, *the disposition of the land was in fee simple*." (emphasis added)).

In *Leo Sheep*, this Court reaffirmed the cardinal principle that the United States does not retain any property interests not expressly reserved in the patent, granting statute, or regulations. In that case, the United States argued that Congress impliedly reserved an easement across the odd-numbered sections of lands patented under the Pacific Railway Acts to access the even-numbered sections. *Leo Sheep*, 440 U.S. at 677-79. Because neither the Acts, nor the patents, expressly reserved an easement for access, this Court ruled that it would not endeavor to "divin[e] some 'implicit' congressional intent" to reserve an easement for access. *Id.* at 679 (quoting *Missouri, K. and T. R. Co.*, 97 U.S. at 497). This Court further explained why the United States' implied reservation argument was so untenable:

> Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. . . . This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined

> power to construct public thoroughfares without compensation.

Id. at 687-88 (footnotes omitted) (emphasis added).

Leo Sheep is dispositive of the question presented. First, the language of the 1875 Act does not so much as hint that the United States would retain an implied reversionary interest in the ROWs after the underlying lands were patented. *Hash*, 403 F.3d at 1317 ("The text of the 1875 Act . . . negate[s] the now-asserted intention on the part of the United States to retain ownership of the lands underlying railway easements when the public lands were disposed of."); *Beres*, 64 Fed. Cl. at 428 ("Congress could have reserved a reversionary interest by including a reversionary right in the 1875 Act itself. The 1875 Act contains no such language.").

Second, in accordance with Section 4 of the 1875 Act, "[g]enerations of land patents have issued without any express reservation of the right now claimed by the [United States]." *E.g.*, *Hash*, 403 F.3d at 1316 (homestead patents); *Beres*, 64 Fed. Cl. at 405 (homestead patent); *see* 43 C.F.R. § 2842.1(a) (1976) ("The Government conveys the *fee simple title* in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company's right of use and possession."). Moreover, it is undisputed that Brandt's Patent was issued without any express reservation of the reversionary interest found

by the Tenth Circuit.[12] Pet. App. 76-79. Instead, in accordance with Section 4 of the 1875 Act, the Patent merely provides that the Brandt's property is "subject to those rights for railroad purposes" granted under the 1875 Act. Pet. App. 78. This "subject to" clause did not reserve anything. *See* James W. Ely, Jr. and Jon W. Bruce, *The Law of Easements & Licenses in Land* § 3:8 (2013) ("'Subject to' language is commonly used in a deed to refer to existing easements, liens, and real covenants that the grantor wishes to exclude from warranties of title.").

Finally, the United States' assertion that it retained implied reversionary interests in 1875 Act ROWs after the underlying lands were patented is of very recent vintage. *See* Brief for the United States, 1942 WL 54245, *29 ("the 1875 Act granted an easement and nothing more"). What prompted the United States' new assertion is unclear. It might have been a 1989 DOI Solicitor's Opinion that concluded that 1875 Act ROWs are "tantamount to a fee interest." Solicitor's Opinion M-36964, 96 I.D. 439, 451 (1989);[13]

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[12] The United States did "reserv[e]" ROWs "for ditches or canals" and two roads in the Patent. Pet. App. 76-77. That the United States expressly reserved some property interests further refutes the existence of any implied reservations. *Leo Sheep*, 440 U.S. at 678-82.

[13] That conclusion was severely criticized in *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1021-24 (S.D. Ind. 2005). In 2011, the 1989 Solicitor's Opinion was overruled as it pertained to 1875 Act ROWs. Solicitor's Opinion M-37025 at 9 (2011), available at http://www.doi.gov/solicitor/opinions/M-37025.pdf

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see Beres, 64 Fed. Cl. at 426 (noting that Solicitor's Opinion M-36964 was issued right after the passage of 16 U.S.C. § 1248(c)). Whatever the reason, one thing is clear: the United States' new assertion of an implied reversionary interest cannot be reconciled with this Court's ruling in *Leo Sheep*, especially considering the thousands of property owners who could be affected. *See* Petition at 17; U.S. Br. at 20; Brief of Amicus Curiae Cato Institute and the National Association of Reversionary Property Owners at 6, 18; Brief of Amicus Curiae Pacific Legal Foundation at 3.

B. Subsequent Statutes Cannot Alter Either Congress's Intent In Passing The 1875 Act Or The Nature Of Previously Granted 1875 Act ROWs.

Support for the implied reversionary interest found by the Tenth Circuit does not exist in the language of the 1875 Act, the applicable DOI regulation, Brandt's patent, or this Court's precedents. As a result, the United States is forced to argue that statutes enacted many years after 1875, primarily § 912, evince Congress's "understanding" that the United States retained an implied reversionary interest in 1875 Act ROWs after the underlying lands were patented. U.S. Br. at 15-16; *see* U.S. 10th Cir. Br. at

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(last visited Nov. 9, 2013) (1875 Act ROWs do "not include, as Opinion M-36964 opines, rights that are 'tantamount to a fee.'").

44-47. The flaws with the United States' argument are manifest.

The ROW at issue was granted under the 1875 Act. Pet. App. 78. The nature and scope of that ROW must be determined from the language of the 1875 Act. *See United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 10-12 (1893) (reviewing language of the 1875 Act to determine what rights a railroad had to remove timber from the public lands). That language must also be construed in light of the condition of the country in 1875. *Amoco*, 526 U.S. at 875 ("public land statutes should be interpreted in light of 'the condition of the country when the acts were passed'" (quoting *Leo Sheep*, 440 U.S. at 682)). At that time, there was no indication of any intent on the part of Congress to retain implied reversionary interests in 1875 Act ROWs after the underlying lands were patented.[14] Such an intent would have defeated Congress's purpose, as reflected in Section 4 of the Act, 43 U.S.C. § 937, to patent lands underlying 1875 Act ROWs to homesteaders. Although homesteaders were willing to pay for land burdened by railroad easements, it strains credulity to think they would have paid for land burdened by railroad easements in

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[14] The 1875 Act was passed while the national policy was to dispose of public lands. Marion Clawson and Burnell Held, *The Federal Lands: Their Use and Management* at 22-27 (1957). It was not until 1976 and the passage of FLPMA that Congress declared a national policy to retain public lands. 43 U.S.C. § 1701(a)(1).

which the United States retained an implied reversionary interest.

Moreover, in 1875, Congress could not have foreseen the need for § 912, because, at that time, railroads were being built – not abandoned. In fact, Congress could not have perceived a real need to address abandoned railroad ROWs until this Court's 1915 decision in *Stringham*, which incorrectly extended the limited fee holding in *Townsend* to 1875 Act ROWs. With this Court characterizing 1875 Act ROWs as limited fees, Congress became concerned about what to do with the strips of land upon abandonment. The importance of this issue was elevated beginning in the early 1920s with the abandonment of railroads. *See* James W. Ely, Jr., *Railroads & American Law* at 266 (2001) ("Starting in the 1920s, railroads began to abandon unprofitable routes and curtail service. Abandoned trackage exceeded new construction for the first time.").

Even though Congress was concerned about abandoned railroads, § 912 does not prove that Congress, in 1875, intended to impliedly reserve a reversionary interest in 1875 Act ROWs. *See Beres*, 64 Fed. Cl. at 428 ("When 43 U.S.C. § 912 was passed in 1922, Congress . reconfirmed the absence of such a reversionary interest in the United States. . . ."). To the contrary, Congress passed § 912 primarily to alleviate the adverse effect of this Court's limited fee decision in *Stringham*. This is evident from the plain language of § 912, which limits its application to "[w]henever *public lands* of the United States have

been or may be granted to any railroad. . . ." (all emphasis added). Use of the term "public lands" indicates that § 912 was intended to apply to those railroad ROW grants that conveyed a limited fee in the land and minerals within the ROW. The mineral reservation in § 912 further supports this conclusion: "the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed. . . ." 43 U.S.C. § 912.[15]

Congress's purpose is also reflected in the legislative history of § 912:

> Under the decision of the courts railroad companies receiving such [ROW] grants take a qualified fee with an implied condition of reverter in the event the companies cease to use the lands for the purposes for which they were granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes the property of the United States.
>
> * * *
>
> It seemed to the committee that such abandoned or forfeited strips are *of little or no*

[15] The district court quieted title to the land and minerals underlying the 1875 Act ROW in favor of Brandt. Pet. App. 58-59; *see* U.S. Br. at 3 n.1 ("This case pertains only to surface rights."). The Tenth Circuit's ruling that § 912 applied to the 1875 Act ROW is therefore inconsistent with Brandt's ownership of the minerals.

> *value* to the Government and that in case of lands in the rural communities they ought in justice become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him *only the land covered by the original patent*.

H.R. Rep. 67-217 at 1-2 (1921) (all emphasis added); *see also* S. Rep. No. 67-388 at 1-2 (1922) (quoting H.R. Rep. 67-217).[16] Thus, § 912 was Congress's attempt to rid the United States of the strips of land it would become saddled with as a result of *Stringham*. *City of Aberdeen*, 602 F. Supp. at 592-93 ("The legislative history of [§ 912] reveals that it was intended to resolve the problem of what to do with the narrow strips of land used as railroad rights-of-way once they were abandoned by the railroad company."); *see Andrus*, 602 F.2d at 1384 (considering a pre-1871 ROW and noting "[t]he reason that Congress adopted [§ 912] was because this narrow strip of land would have little use or value to the government.").

Ignoring that Congress was operating under a mistaken belief that 1875 Act ROWs were limited fees, the United States argues that § 912 reflects Congress's understanding that the United States retained

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[16] Appended to H.R. Rep. No. 67-217 was a letter from Acting Secretary of the Interior, E.C. Finney, in which he cites *Stringham* and *Townsend*. H.R. Rep. No. 67-217 at 2-3 (1921). This letter makes clear that Congress's focus was on addressing limited fee ROWs.

an implied reversionary interest in 1875 Act ROWs. U.S. Br. at 15-16, 16. The shortcoming of the United States' argument is that the language and history of § 912 confirm that it was Congress's intent in passing the 1875 Act to grant only easements to railroads.

In passing the 1875 Act, Congress intended to grant only easements to the railroads so that homesteaders could settle on the lands traversed by the ROWs and receive patents conveying fee simple title to the land subject only to the easement. 43 U.S.C. § 937 ("all such lands over which such right of way shall pass shall be disposed of subject to such right of way"); *Great Northern*, 315 U.S. at 271-75. Based upon *Stringham*, however, Congress feared that the 1875 Act would no longer achieve its intended purpose. *See* H.R. Rep. No. 67-217 at 1-2 (1921) ("under the decision of the courts railroad companies receiving [ROW] grants take a qualified fee with an implied condition of reverter"). As a result, Congress passed § 912 to more fully achieve the result it originally intended by the 1875 Act, *i.e.*, that homesteaders would receive all the land described in their patents, including abandoned 1875 Act ROWs. H.R. Rep. No. 67-217 at 2 (1921) ("Granting such relief in reality gives [the settler] only the land covered by the original patent."); 43 U.S.C. § 912 ("and this by virtue of the patent thereto"). After *Great Northern* corrected the inaccurate statement in *Stringham*, Congress's original intent in passing the 1875 Act is fully achieved without any assistance from § 912.

In any event, Congress's mistaken belief in 1922 cannot redefine the property interests granted under the 1875 Act. The views of a subsequent Congress generally "form a hazardous basis for inferring the intent" of an earlier one. *United States v. Price*, 361 U.S. 304, 313 (1960); *Rainwater v. United States*, 356 U.S. 590, 593 (1958); (The subsequent act "is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance."). Granted, in *Great Northern*, this Court looked at the forfeiture acts of 1906 and 1909 and the Act of June 26, 1906, 43 U.S.C. § 944, to confirm its conclusion that 1875 Act ROWs are easements. 315 U.S. at 276-77. But this Court's reliance on those acts was at the urging of the United States. [17] Brief for the United

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[17] The United States now argues the forfeiture acts of 1906 and 1909 support a finding of an implied reversionary interest. U.S. Br. at 14-15. The Federal Circuit, however, rejected the United States' new argument. *Hash*, 403 F.3d at 1315 ("[E]ven on the government's strained construction of [43 U.S.C.] § 940, the forfeited easement automatically inured to the benefit of the owner of the underlying land 'without need of further assurance or conveyance.' Even on the government's construction, this 1909 enactment cannot be viewed as overruling the 1875 Act by implication, thereby disrupting thousands of land grants and long-vested property rights." (quoting 43 U.S.C. § 940)). Moreover, the United States' new argument cannot be reconciled with the Act of June 26, 1906, 43 U.S.C. § 944, which proves that 1875 Act ROWs are easements. *See Missouri-Kansas-Texas R. Co.*, 177 F.2d at 456 (through operation of the Act of June 26, 1906, 43 U.S.C. § 944, the railroad received only "an easement for railroad purposes").

States, 1942 WL 54245, **25-29. Moreover, because this Court ruled Congress intended to grant only an easement under the 1875 Act, *Great Northern*, 315 U.S. 274-79, that is the full extent of the property interest that the railroad in this case received in 1908. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("It is this Court's responsibility to say what a statute means. . . . A judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction.") (emphasis added). Even if Congress could later redefine that previously granted ROW to contain an implied reversionary interest, there is no evidence that it did. In passing § 912, Congress was neither amending the 1875 Act, nor redefining previously granted property interests. Instead, Congress was trying to effectuate its original intent in passing the 1875 Act and to avoid being saddled with strips of land throughout the country in light of *Stringham*. And, although *Great Northern* may have made § 912 inapplicable to 1875 Act ROWs by effectuating Congress's original intent in passing the 1875 Act, that does not render § 912 null. Instead, as the United States acknowledges, § 912 may still apply to pre-1871 ROW grants.[18] *See* U.S. Br. 9 n.4 (listing cases that suggest § 912 applies to pre-1871 ROW grants).

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[18] Even if § 912 somehow created an implied reversionary interest in the 1875 Act ROW, the United States failed to reserve that interest in Brandt's Patent. As a result, the United States

(Continued on following page)

The United States also implies that 16 U.S.C. § 1248(c) reveals Congress's understanding that the United States had an implied reversionary interest in 1875 Act ROWs. U.S. Br. 15-16. Even if a subsequent Congress could shed light on the intent of a Congress more than 100 years earlier, 16 U.S.C. § 1248(c) neither mentions nor reveals anything about the 1875 Act. The statutory language provides "any and all" interest in "all rights-of-way *of the type* described in [§ 912] shall remain in the United States upon the abandonment." 16 U.S.C. § 1248(c) (emphasis added). As demonstrated above, the type of ROWs described in § 912 are limited fees. Because Congress legislates with this Court's decisions as a backdrop, *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995), it must be presumed that Congress was aware of this Court's ruling in *Great Northern* that 1875 Act ROWs are easements when it passed 16 U.S.C. § 1248(c). Thus, Congress must have known that 1875 Act ROWs are not "rights-of-way of the type described in [§ 912]." By

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conveyed that implied reversionary interest to Brandt. *See Magnolia Petroleum Co.*, 110 F.2d at 217; Lewis M. Sines, Future Interests 70 (2d ed. 1966) ("[a] vested future interest is alienable"); Joyce Palomar, *Patton and Palomar on Land Titles* § 164 at 452-54 (3d ed. 2003) ("[W]ith every transfer of land, title also passes, without specific description or even mention, to all the appurtenances and incidents rightfully belonging to it and which are essential to the full enjoyment of the property . . including the grantor's underlying title in railroad rights of way. . ."). The United States' attempt to distinguish patents issued before and after passage of § 912 is simply unavailing. *See* U.S. Br. at 16 n.7.

referencing "rights-of-way of the type described in [§ 912]," Congress effectively excluded 1875 Act ROWs from the application of 16 U.S.C. § 1248(c). As a result, the United States' suggestion that 16 U.S.C. § 1248(c) reveals Congress's understanding that the United States had an implied reversionary interest in 1875 Act ROWs is meritless.[19]

C. Cases Interpreting Pre-1871 ROW Grants Cannot Create An Implied Reversionary Interest In 1875 Act ROWs.

The United States argues that *Union Pacific* eliminated any meaningful distinction between pre-1871 ROWs and 1875 Act ROWs. U.S. Br. at 11-12. From this, the United States surmises that because courts have held that the United States retains an

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[19] In passing 16 U.S.C. § 1248(c), Congress was uncertain whether the United States had an implied reversionary interest in *any* railroad ROWs. Pub. L. No. 100-470 § 2, 102 Stat. 228 (1988) ("Congress hereby finds that . . [t]he United States should retain *any residual interest it may have* in such public land rights-of-way. . . " (emphasis added)); S. Rep. No. 100-408 (1988) at 6, *reprinted in*, 1988 U.S.C.C.A.N. 2607, 2611 ("[16 U.S.C. § 1248(c)] provides that in the event of future abandonments of railroad rights-of-way . . . the United States would retain *whatever interest it may have* in the abandoned railroad right-of-way." (emphasis added)). Even the Secretary of Agriculture criticized 16 U.S.C. § 1248(c) because it "assumes that the United States has some remaining residual interest in certain railway rights-of-way which could be converted to recreation trail uses. That may or may not be the case." S. Rep. No. 100-408 (1988) at 10, *reprinted in*, 1988 U.S.C.C.A.N. 2607, 2614.

implied reversionary interest in pre-1871 ROWs, the United States owns a similar interest in 1875 Act ROWs. U.S. Br. at 16-17. The defects in the United States' syllogism are obvious.

In *Union Pacific*, this Court did not reject the distinction *Great Northern* noted between 1875 Act ROWs and pre-1871 ROWs. To the contrary, this Court reiterated *Great Northern*'s ruling that a "great shift in congressional policy occurred in 1871[,]" and "after that period only an easement for railroad purposes was granted. . . ." *Union Pacific*, 353 U.S. at 119. Although *Union Pacific* may have lessened the scope of some pre-1871 ROWs to exclude oil, gas, and other minerals (except coal and iron), courts continued to recognize a significant distinction between pre-1871 ROWs and 1875 Act ROWs. *Udall*, 379 F.2d at 640 ("[T]hat the result which we reach treats pre-1871 grants differently from those made later is not controlling because that difference had its origin in a change of congressional policy relating to rights-of-way for railroads crossing the public domain."); *Andrus*, 602 F.2d at 1382 ("In 1875, as a result of the changed attitude, Congress passed the [1875 Act]. This granted an easement only to railroads. . . . The 1875 Act is, therefore, somewhat significant in that it reduced the quality of the grant to the railroads. This shows that it was something more than a simple easement prior to 1875.") (internal citation and footnote omitted)).

After *Union Pacific*, the DOI also continued to recognize a distinction between pre-1871 ROWs and

1875 Act ROWs. *Compare George W. Zarak*, 4 IBLA 82, 87 (1971) (A pre-1871 ROW "is more than an easement; it is an interest sufficient to remove the land it covers from the category of public land available for disposition under the general land laws.") *aff'd sub nom., Rice v. United States*, 348 F. Supp. 254 (D. N.D. 1972) *aff'd*, 479 F.2d 58 (8th Cir. 1973), *with Amerada Hess Corp.*, 24 IBLA at 371-78 (an 1875 Act ROW is an easement that does not remove the land it traverses from the category of public lands available for disposition). This recognition continues today. Solicitor's Opinion M-37025 at 2 ("The nature of individual ROW grants . . . is not uniform and depends upon the specific statute authorizing a particular grant."); *id.* at 6 ("After the *Union Pacific* decision, *Great Northern*'s distinction between pre-1871 and 1875 Act ROWs remains relevant to determining what rights a railroad received under the 1875 Act relative to the government grantor. . . . [W]e conclude that the rights conveyed by the 1875 Act are narrower than the pre-1871 acts, contrary to Opinion M-36964's conclusion that a railroad received 'an interest tantamount to fee ownership' in the 1875 Act ROWs.").

Despite the DOI's present-day recognition of a distinction between pre-1871 ROWs and 1875 Act ROWs, the United States brazenly cites *Townsend* and more recent cases interpreting pre-1871 ROW grants for the proposition that a reversionary interest in the 1875 Act ROW did not have to be reserved in Brandt's Patent because the land was already

appropriated. *See* U.S. Brief at 17 (citing *Mauler v. Bayfield Cnty.*, 309 F.3d 997, 1000-02 (7th Cir. 2002) and *Rice*, 479 F.2d at 59). *Townsend* and these other cases are simply irrelevant because they involved pre-1871 ROWs. *Udall*, 379 F.2d at 640 (noting that the United States "concede[d]" post-1871 railroad ROWs did not appropriate the land from disposition under the public land laws); *see Home on the Range*, 386 F. Supp. 2d at 1003-07, 1016-20 (pre-1871 ROWs appropriated the land within the ROW from disposition under the public land laws, but 1875 Act ROWs did not); *see also Samuel C. Johnson 1988 Trust*, 649 F.3d at 805 (criticizing the reasoning in *Mauler*).

The United States also relies on this Court's decision in *Stalker v. Oregon Short Line R.R. Co.*, 225 U.S. 142, 153 (1912) for the proposition that 1875 Act ROWs appropriated the land and, therefore, no reservation of a reversionary interest in the ROW had to be expressed in Brandt's Patent. U.S. Brief at 17. To the extent that *Stalker* ruled that 1875 Act ROWs appropriated the land, that ruling was effectively overruled by *Great Northern*. *See Continental Oil*, 253 F.2d at 472 (noting "appropriation theory" in *Stalker* regarding 1875 Act ROWs was another way of articulating "the limited fee concept" that was rejected in *Great Northern*).

In sum, the United States' assertion that there is no distinction between pre-1871 ROWs and 1875 Act ROWs simply cannot be squared with this Court's decisions in *Great Northern* and *Union Pacific*, the DOI's current interpretation, or decisions

by the lower courts. Thus, whether other courts may have held that the United States retained an implied reversionary interest in pre-1871 ROWs or that pre-1871 ROWs appropriated the land is irrelevant to the question presented.[20]

D. *Marshall* And *Oregon Short Line I* Provide No Support For The Finding Of An Implied Reversionary Interest In 1875 Act ROWs.

The Tenth Circuit summarily ruled that the United States retained an implied reversionary interest in the 1875 Act ROW. Pet. App. 5-6. The Tenth Circuit based its ruling on its early decision in *Marshall*, which had ruled that § 912 applies to 1875 ROWs. *Id.* *Marshall*, however, reached its conclusion based upon *Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985) ("*Oregon Short Line I*"). *Marshall*, 31 F.3d at 1032. Neither *Marshall* nor *Oregon Short Line I* justify the finding of an implied reversionary

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[20] Even if there were no present-day distinction between pre-1871 ROWs and 1875 Act ROWs, that does not support the United States' argument of an implied reversionary interest. If anything, pre-1871 ROWs are more like 1875 Act ROWs, not *vice versa*. That would make pre-1871 ROWs more like easements. *See Union Pacific*, 353 U.S. at 122 (Frankfurter, J., dissenting) (criticizing the majority opinion because it effectively lessened the nature of pre-1871 ROWs to that of an easement). And, as demonstrated above, there is no implied reversionary interest remaining in the United States once land burdened by an easement is patented.

interest that would upset the settled expectations of thousands of landowners.

Marshall involved a 1973 patent that conveyed land "subject to" an 1875 Act ROW. 31 F.3d at 1029. After the patent was issued, the railroad unlawfully deeded away all its interest in the ROW to private third parties before abandoning the ROW.[21] *Id.* Thereafter, the underlying fee owners filed suit against the railroad and its grantees seeking a judicial decree of abandonment under § 912 and a declaration quieting title to the ROW in their favor. *Id.* The railroad and its grantees defended by arguing that § 912 did not apply to 1875 Act ROWs and that they could acquire the 1875 Act ROW through adverse possession. *Id.* at 1030.

That the underlying landowners clearly had equity on their side must have influenced the Tenth Circuit's blind embrace of their argument that § 912 applied to the 1875 Act ROW. Indeed, the Tenth Circuit did not bother to analyze either the language of the 1875 Act or the applicable DOI regulation. If it had, the underlying landowners would have prevailed on the strength of their patent alone. *See* Parts I-D and II-A, *supra*. Instead, the Tenth Circuit simply adopted the conclusion in *Oregon Short Line I* that § 912 applies to 1875 Act ROWs. *Marshall*, 31 F.2d at

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[21] The Tenth Circuit had previously ruled that railroads could not convey their interests in 1875 Act ROWs to private parties. *Himonas*, 179 F.2d at 173.

1032. In short, *Marshall* correctly quieted title in the 1875 Act ROW in favor of the underlying landowners, although its reliance on § 912 was improper.

Oregon Short Line I is equally deficient.[22] That case involved a dispute between a county and owners of the land underlying an 1875 Act ROW. *Oregon Short Line I*, 617 F. Supp. at 208-10. Seeking to take advantage of the provision in § 912 that allows a municipality to acquire a railroad ROW upon a judicial decree of abandonment, the county moved for summary judgment on the legal issue of whether § 912 applies to 1875 Act ROWs. *Id.* at 209. The landowners, not relying on their patents, argued that § 912 does not apply to 1875 Act ROWs because the 1875 Act conveyed only an easement. *Id.* at 209-10. Although the district court noted that *Great Northern* had ruled 1875 Act ROWs were easements, the district court was not convinced that such easements could not contain an implied reversionary interest. *Id.* at 212 ("[E]ven if the 1875 Act granted only an easement, it does not necessarily follow that Congress

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[22] The United States also cites *Oregon Short Line I* for the proposition that *Union Pacific* eliminated any distinction between pre-1871 ROWs and 1875 Act ROWs. U.S. Br. at 12. Yet, even *Oregon Short Line I* recognized a continuing distinction between pre-1871 ROWs and 1875 Act ROWs. 617 F. Supp. at 211-12 (noting that the 1875 Act did not grant a fee interest (as pre-1871 ROW grants did), but granted only a ROW "suitable for railroad purposes. . . ."); *see* Solicitor's Opinion M-37025 at 7 (noting that Solicitor's Opinion M-36964's conclusion that the 1875 Act conveyed an interest "tantamount to a fee" could not be reconciled with *Oregon Short Line I*).

would or did not intend to retain an interest in that easement."). To its credit, the district court recognized the answer depended on Congress's intent. But, instead of looking at Congress's intent in passing the 1875 Act, the court looked at § 912.[21] Although the court recognized that Congress only "believed" it had "'implied reverters'" in 1875 Act ROWs based upon *Stringham*, *id.* at 210-11, the court felt compelled to apply § 912 to 1875 Act ROWs, because the court thought § 912 would "be rendered null" otherwise. *Id.* at 212; *but see* U.S. Br. at 9 n.4 (noting § 912 may apply to pre-1871 ROW grants). In so doing, the court lost sight that Congress was acting under a mistaken belief when it passed § 912.

To be sure, a court should not construe a statute so as to diminish its effect. That canon of construction, however, must yield when Congress is acting under a mistaken belief. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (Canons of construction "are not mandatory rules. They are guides that 'need not be conclusive.' They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force." (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). When Congress

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[21] The district court also looked at two other statutes passed in the 1920s, 43 U.S.C. § 913 and 23 U.S.C. § 316. *Id.* at 213. For the same reasons applicable to § 912, these statutes cannot establish an implied reversionary interest in 1875 Act ROWs.

passed § 912, it mistakenly believed, as a result of *Stringham*, that 1875 Act ROWs were limited fees and that the United States would retain a reversionary interest in the 1875 Act ROWs upon abandonment. Both the 1875 Act and § 912, however, prove that Congress never intended to retain such an interest when it passed the 1875 Act. In short, despite its attempt to effectuate what it perceived to be Congress's intent in passing § 912, the court in *Oregon Short Line I* frustrated Congress's intent in passing the 1875 Act.[24]

As other courts have noted, *Marshall* and *Oregon Short Line I* are unpersuasive because they did not analyze the 1875 Act or the patents conveying the underlying lands to determine the nature of the parties' respective property interests. *Samuel C. Johnson*, 649 F.3d at 803-04 ("If *Marshall* was correctly decided, no one in 2011 who owned land subject to the 1875 Act – that is, land over which there had once been a federal railroad right of way – has a right to prevent the federal government from recapturing the right of way

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[24] The railroad in *Oregon Short Line I* never took a position on whether § 912 applied. 617 F. Supp. at 209. Instead, the railroad argued that no abandonment had occurred. *Id.* The district court agreed with the railroad two months later. *Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 213, 215-18 (D. Idaho 1985) ("*Oregon Short Line II*"). In so doing, the district court made *Oregon Short Line I* academic, if not dicta. Unfortunately, every case that has suggested that the United States retains an implied reversionary interest in 1875 Act ROWs after the underlying lands are patented relies on *Oregon Short Line I*. *See, e.g.*, U.S. Br. at 18 (citing cases).

– of course without compensation – and giving it away or selling it."); *Beres*, 64 Fed. Cl. at 425 ("[N]one of the cases which have found a reversionary interest in the United States analyzed the words of the 1875 Act, or an intervening land patent from the United States, to determine the nature of the land interest before and after a railroad right-of-way grant."); *Home on the Range*, 386 F. Supp. 2d at 1019 (noting that *Oregon Short Line I* did not address the significance of Section 4 of the 1875 Act through which the underlying lands would be disposed of subject to the ROW). Accordingly, *Marshall* and *Oregon Short Line I* provide no support for the finding of an implied reversionary interest in 1875 Act ROWs.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Under 43 U.S.C. 912 and 16 U.S.C. 1248(c), when a railroad ceases the use and occupancy of a right-of-way granted to it from the public lands, and the right-of-way's forfeiture or abandonment is declared or decreed by a court of competent jurisdiction or by Act of Congress, all surviving right, title, interest, and estate of the United States shall remain in the United States, except to the extent that any such right-of-way is embraced within a public highway no later than one year after the determination of abandonment or forfeiture or is located within a municipality. The question presented is:

Whether the United States retains a reversionary interest in rights-of-way granted from public lands to railroads under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. 934-939, such that the disposition of such rights-of-way is governed by 43 U.S.C. 912 and 16 U.S.C. 1248(c).

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In the Supreme Court of the United States

No. 12-1173

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is not published in the *Federal Reporter* but is reprinted at 496 Fed. Appx. 822. The opinion of the district court (Pet. App. 10-56) is not published in the *Federal Supplement* but is available at 2008 WL 7185272.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2012. A petition for rehearing was denied on December 26, 2012 (Pet. App. 67-68). The petition for a writ of certiorari was filed on March 26, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves whether the United States retains a reversionary interest in a right-of-way granted under the General Railroad Right-of-Way Act of 1875 (1875 Act), 43 U.S.C. 934-939, when the land traversed by the right-of-way has been conveyed into non-federal ownership. The 1875 Act specifies that "the right of way through the public lands of the United States is hereby granted to any railroad company * * * [that has met certain requirements], to the extent of one hundred feet on each side of the central line of said road." 43 U.S.C. 934. Under the statute, a railroad company must file a profile of its rail corridor with the local U.S. Department of the Interior land office within 12 months after survey or location of the road; upon Interior's approval, the right-of-way is to be noted on the plats at that office, and thereafter "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." 43 U.S.C. 937. The statute expressly "reserve[d]" Congress's "right at any time to alter, amend, or repeal [the 1875 Act] or any part thereof." 43 U.S.C. 939.

In 1922, Congress enacted the Railroad Right-of-Way Abandonment Act, 43 U.S.C. 912, to address forfeiture and abandonment of federally granted rights-of-way. Congress intended for Section 912 to apply to the 1875 Act, under which most rights-of-way over federal lands had been granted. See S. Rep. No. 388, 67th Cong., 2d Sess. 1 (1922) (noting most rights-of-way were granted under 1875 Act); *id.* at 2 (explaining the statute's operation on 1875 Act rights-of-way).

Under Section 912, any railroad that was granted a right-of-way from the public lands for railroad use would relinquish that right-of-way when it ceased its use and occupancy and its "forfeiture" or "abandonment" was

"declared or decreed by a court of competent jurisdiction or by Act of Congress." 43 U.S.C. 912. Upon such a declaration or decree, "all right, title, interest, and estate of the United States in said lands" composing the right-of-way was to be transferred to the owner of the property traversed by the right-of-way, unless the right-of-way was either embraced in a public highway established within one year after such declaration or located within a municipality. *Ibid.*[1]

In 1988, Congress repealed Section 912's provision for the transfer of an abandoned right-of-way to the owner of the land it crosses or to a municipality. 16 U.S.C. 1248(c). Section 1248(c) permits a public highway to be established on a right-of-way within a year after a decree or declaration of abandonment is still operative, but it otherwise provides that, "[c]ommencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in [43 U.S.C. 912] shall remain in the United States." *Ibid.*

2. In this suit, the United States sought to quiet title to a stretch of railroad right-of-way in southern Wyoming. Pet. App. 11. The right-of-way was granted under the 1875 Act to the Laramie, Hahn's Peak and Pacific Railroad Company in 1908, when all of the surrounding land was federal or state land. *Id.* at 13; Gov't C.A. Br. 8. As relevant here, the right-of-way crossed an approximately 83-acre parcel that was, in 1976, patented to petitioners' predecessor in interest in a land exchange with the Forest Service. Pet. App. 13.

In November 1987, the Wyoming and Colorado Railroad Company became the last successor to the right-of-

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[1] A proviso in Section 912 reserved to the United States "oil, gas, and other minerals in the land so transferred." 43 U.S.C. 912. This case pertains only to surface rights.

way. Pet. App. 13. Pursuant to the Surface Transportation Board's regulatory approval process, the railroad abandoned the applicable rail line in 2004. *Id.* at 13-14.

In 2006, the United States filed suit to quiet title to a 28.08-mile section of the right-of-way in order to extend a pre-existing recreational trail across it. Pet. App. 11; Gov't C.A. Br. 7-8. Consistent with 43 U.S.C. 912 and 16 U.S.C. 1248(c), the United States sought a declaratory judgment that the right-of-way was abandoned, and that all right, title, and interest in it therefore vested in the United States; the United States filed suit against 51 landowner-defendants, including petitioners (a trust and its trustee). Gov't C.A. Br. 3. With the exception of petitioners, all of the other landowner defendants settled with the United States or failed to appear and had default judgments entered against them. *Ibid.*; Pet. App. 12. Petitioners filed several counter claims, including a claim to quiet title to the right-of-way in them. *Id.* at 12.

3. The district court declared the right-of-way abandoned and entered judgment in favor of the United States on the quiet-title question. Pet. App. 57-59. On cross-motions for summary judgment, the district court recognized "an obvious split in decisions among the federal circuit courts," but followed Tenth Circuit precedent and therefore concluded that "the United States retains a reversionary interest in all 1875 Act [rights-of-way]." *Id.* at 26 (citing *Marshall* v. *Chicago & Nw. Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994)). The district court further held that, upon the court's declaration of abandonment pursuant to 43 U.S.C. 912, the right-of-way reverted to the United States pursuant to 16 U.S.C. 1248(c). Pet. App. 29-30.

4. The court of appeals affirmed. Pet. App. 1-9. Like the district court, the court of appeals "recognize[d]"

that other circuits had reached contrary conclusions but determined that it was bound to follow circuit precedent in *Marshall*. *Id.* at 5-6.

In *Marshall*, the court of appeals had considered whether Section 912 governs the disposition of 1875 Act rights-of-way.[2] The defendants in *Marshall* contended, as petitioners do here, that Section 912 did not apply to the 1875 Act right-of-way because the United States retained no right, title, or interest in it, relying in large part on the characterization of an 1875 Act right-of-way as an "easement" in *Great Northern Railway Co.* v. *United States*, 315 U.S. 262 (1942). See *Marshall*, 31 F.3d at 1031.

Marshall rejected the contention that *Great Northern*'s characterization of an 1875 Act right-of-way barred the application of Section 912. 31 F.3d at 1031. In doing so, *Marshall* relied on a historical analysis of some 100 years of case law pertaining to federally granted railroad rights-of-way set forth in prior Tenth Circuit decisions and in *Idaho* v. *Oregon Short Line Railroad Co.*, 617 F. Supp. 207 (D. Idaho 1985). Those cases recognized that, although Congress had discontinued granting blocks of land to railroads after 1871, it still intended for railroads to have exclusive use and possession of their rights-of-way, which created inconsistencies with describing the nature of the railroads' interest in terms of a traditional easement. See, *e.g.*, *Wyoming* v. *Udall*, 379 F.2d 635,

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[2] *Marshall* was decided in 1994, several years after Section 1248(c) modified Section 912 to provide for the United States' interests in abandoned railroad rights-of-way to remain in the United States. The United States, however, was not a party to *Marshall*, and the question of the application of Section 1248(c) was not addressed in that case.

640 (10th Cir.), cert. denied, 389 U.S. 985 (1967); *Oregon Short Line*, 617 F. Supp. at 210.

As pertinent here, the definitional issue was addressed in three key cases. First, in *Northern Pacific Railway Co.* v. *Townsend*, 190 U.S. 267 (1903), this Court addressed whether owners of land traversed by a railroad right-of-way granted under an 1864 statute could gain adverse possession to a portion of the right-of-way on which they grew crops. *Id.* at 271. In holding that they could not, the Court explained that, although the right-of-way did not constitute a fee simple interest, it was a "limited fee" interest with an implied right of reverter in the United States when the right-of-way was no longer used for the purposes granted. *Ibid.*; see *Rio Grande W. R.R. Co.* v. *Stringham*, 239 U.S. 44, 47 (1915) (also describing 1875 Act rights-of-way as "limited fee" interests).

Second, in 1942 in *Great Northern*, this Court addressed whether a railroad owned the mineral estate under an 1875 Act right-of-way. The Court held that it did not, characterizing the 1875 Act rights-of-way as an "easement," and describing *Stringham*'s "limited fee" characterization as "inaccurate." 315 U.S. at 276-279. The Court distinguished the 1875 Act right-of-way from the right-of-way in *Townsend*, which had been granted under an 1864 statute, reasoning that, when Congress stopped subsidizing railroad construction with land grants after 1871, it also altered the rights-of-way to provide no fee interest to the railroads. See *id.* at 274-275.

Third, in *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112 (1957), the Court considered whether a right-of-way granted under a pre-1871 statute conveyed the underlying mineral estate to the railroad. The Court

concluded that it did not, reaching the same result as in *Great Northern* but calling into question its prior statements that the pre-1871 statutes had granted a full-fee interest to railroads. *Id.* at 119 (characterizing *Great Northern*'s "suggestion that a right of way may at times be more than an easement" as having been "made in an effort to distinguish" cases like *Stringham*).

On the basis of that history and the underlying statutes, *Oregon Short Line*—which was later followed by *Marshall*, 31 F.3d at 1032—concluded that, although Congress "did not intend [in the 1875 Act] to convey to the railroads a fee interest in the underlying lands," it nevertheless intended to convey a right-of-way that "carried with it the right to exclusive use and occupancy of the land," which goes beyond "a simple easement" "under traditional rules." 617 F. Supp. at 212. Moreover, the court explained, "[e]ven if the 1875 Act granted only an easement * * * Congress had authority * * * to grant such easements subject to its own terms and conditions" and "it did not necessarily follow that Congress would or did not intend to retain an interest in that easement." *Ibid.* The court observed that, in enacting Section 912 (and other provisions), "Congress clearly felt that it had some retained interest in railroad rights-of-way," *ibid.*, which did not need to be "shoehorned into any specific category cognizable under the rules of real property law." *Marshall*, 31 F.3d at 1032 (quoting *Oregon Short Line*, 617 F. Supp. at 212). Thus, the court concluded, even assuming that the 1875 Act granted only easements, Congress nevertheless intended to retain rights or interests in those easements, such that Section 912 applies to them. See *id.* at 1032; *Oregon Short Line*, 617 F. Supp. at 212-213.

Finding that *Marshall*'s reasoning controlled in this case, the court of appeals did not address the reasoning of more recent decisions of the Federal Circuit and Seventh Circuit on which petitioners relied. Pet. App. 5-6. It concluded that "the district court correctly held that the interest in the abandoned railroad right-of-way belongs to the United States." *Id.* at 6. It therefore affirmed, in relevant part, the decision to quiet title in favor of the United States. *Id.* at 9.[3]

DISCUSSION

The court of appeals' decision is correct. It relies on previous lower-court decisions that reconcile competing decisions of this Court and give effect to important federal statutes that would be rendered null under petitioners' interpretation. The courts of appeals, however, are divided on whether the United States may retain a reversionary interest in a railroad right-of-way issued under the 1875 Act. That question is sufficiently important and recurring to warrant this Court's review.

1. The court of appeals correctly held that the United States retains a reversionary interest in abandoned 1875 Act rights-of-way. Petitioners' argument to the contrary (Pet. 17-21) rests largely on this Court's characterization of an 1875 Act right-of-way as an "easement" in *Great Northern Railway Co.* v. *United States*, 315 U.S. 262, 279 (1942), and on petitioners' contention (Pet. 19-20, 24) that the right-of-way must therefore operate as a common-law easement that merges with the servient estate when abandoned. *Great Northern*, however, did not

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[3] The court of appeals also addressed petitioners' appeal of the district court's decision with respect to different legal questions involving two road easements, Pet. App. 6-9, but that aspect of its decision is not at issue in this Court. See Pet. 12 n.4.

address the extent of any retained interest of the United States in 1875 Act rights-of-way, and it did not consider statutes from the 1920s, including 43 U.S.C. 912, that exercised federal control over the post-abandonment disposition of such rights-of-way. Furthermore, neither the distinction drawn in *Great Northern* (at the government's invitation) between pre- and post-1871 statutes nor the text and legislative history of the relevant statutes provide a basis for concluding that Congress intended in the 1875 Act to give up the continuing control it undisputedly exercised over previously granted rights-of-way.[4]

a. Courts have long struggled with how to characterize the nature of the property interests in federally granted railroad rights-of-way. Much of the difficulty derives from the special nature of such rights-of-way. As explained in *New Mexico* v. *United States Trust Co.*, 172 U.S. 171 (1898), a right-of-way that is subject to only intermittent and occasional use is typically deemed to be an easement, while one subject to "perpetual and continuous" use (such as a railroad right-of-way) may be deemed to require the fee for its enjoyment. *Id.* at 183. Thus, more than 20 years after the passage of the 1875 Act, this Court recognized, with respect to a railroad

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[4] Courts have consistently held that the United States retains an implied right of reverter in rights-of-way arising under pre-1871 statutes, the disposition of which is governed by 43 U.S.C. 912 and, where applicable, 16 U.S.C. 1248(c). See, *e.g.*, *Avista Corp.* v. *Wolfe*, 549 F.3d 1239, 1247-1251 (9th Cir. 2008); *Samuel C. Johnson 1988 Trust* v. *Bayfield Cnty.*, 520 F.3d 822, 831 (7th Cir. 2008); *Mauler* v. *Bayfield Cnty.*, 309 F.3d 997, 1002 (7th Cir. 2002), cert. denied, 538 U.S. 1032 (2003); *Vieux* v. *East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1337 (9th Cir.), cert. denied, 498 U.S. 967 (1990); *Wyoming* v. *Andrus*, 602 F.2d 1379, 1384 (10th Cir. 1979); *Wyoming* v. *Udall*, 379 F.2d 635, 640 (10th Cir.), cert. denied, 389 U.S. 985 (1967).

right-of-way, that "if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." *Ibid.*; see *Western Union Tel. Co.* v. *Pennsylvania R.R. Co.*, 195 U.S. 540, 570 (1904) (noting that a railroad right-of-way is "more than a mere right of passage," "is more than an easement," and has "the substantiality of the fee"); *Railroad Co.* v. *Baldwin*, 103 U.S. 426, 429 (1880) (referring to a railroad right-of-way as constituting "a present absolute grant").

In 1903, however, this Court took a step away from that characterization in *Northern Pacific Railway Co.* v. *Townsend*, 190 U.S. 267 (1903). Faced with the question whether such rights-of-way were subject to adverse possession by surface use, *Townsend* held that the rights-of-way at issue there were "limited fee" interests that did not give a railroad a fee simple interest but instead reverted to the United States when they were no longer used for the intended purposes. *Id.* at 271.

Nearly 40 years later, in *Great Northern*, this Court took another step away from the full-fee characterization of railroad rights-of-way. In that case, the Court considered whether an 1875 Act right-of-way granted the underlying oil and mineral interests to the railroad. Apparently assuming that the "limited fee" interest described in *Townsend* included the mineral interests in the right-of-way, *Great Northern* distinguished between pre- and post-1871 statutes and characterized the 1875 Act as granting an "easement" rather than a "limited fee" interest. 315 U.S. at 277-278. The Court noted, however, that none of the prior cases involved the question of rights to subsurface minerals, *id.* at 278-279,

raising a question about the extent of the differences between 1875 Act rights-of-way and their earlier counterparts.[5]

In *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112 (1957), the Court answered the mineral-rights question with respect to a pre-1871 right-of-way. The Court held that an 1862 statute granting a right-of-way to the Union Pacific—like the 1875 Act as construed in *Great Northern*—did not convey mineral interests to the railroad. *Id.* at 114-120. While *Union Pacific* relied in part on specific language in the 1862 statute, *id.* at 114-115, the Court also sought to reconcile its earlier decisions characterizing the property interest in federally granted railroad rights-of-way. *Union Pacific* rejected the argument that *Townsend* and its progeny compelled a ruling that the railroad owned the subsurface mineral rights, concluding that "[t]he most that the 'limited fee' cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes." *Id.* at 119. The Court also avoided applying *Great Northern*'s distinction between pre- and post-1871 Acts, reasoning that "[t]he suggestion that a right of way may at times be more than an easement was made in an effort to distinguish the earlier 'limited fee' cases," none of which had involved subsurface oil and minerals. *Ibid.*

As lower courts have since observed, "[t]he language of the 1862 Act under which the Union Pacific obtained

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[5] While the United States' brief in *Great Northern* principally contended that post-1871 railroad rights-of-way were "in the nature of an easement," U.S. Br. at 8, *Great Northern*, *supra* (No. 149), it argued in the alternative that such rights-of-way constituted limited fee interests in only "the surface and so much of the subsurface as is necessary for support," *id.* at 37.

its right-of-way and the language of the 1875 Act are identical in all important respects." *Wyoming* v. *Udall*, 379 F.2d 635, 638 (10th Cir.), cert. denied, 389 U.S. 985 (1967); see *Idaho* v. *Oregon Short Line R.R. Co.*, 617 F. Supp. 207, 210 n.1 (D. Idaho 1985). Accordingly, the Court's decision in *Union Pacific* "significantly undercut[s]" the distinction drawn in *Great Northern* between pre- and post-1871 statutes granting rights-of-way at least as they relate to the question here. *Oregon Short Line*, 617 F. Supp. at 212.

b. The statutory text and legislative history of the 1875 Act also support limiting *Great Northern*'s distinction between pre- and post-1871 rights-of-way.

Great Northern relied on three aspects of the 1875 Act's language. First was its provision for the grant of "'*the*,' not *a*, 'right of way through the public lands.'" 315 U.S. at 271 (quoting 43 U.S.C. 934) (emphases added). But the 1864 statute at issue in *Townsend* also granted "*the* right of way through the public lands," as did many other railroad grant statutes. Act of July 2, 1864, ch. 217, § 2, 13 Stat. 367 (emphasis added); see, *e.g.*, Act of June 7, 1872, ch. 323, § 1, 17 Stat. 280; Act of July 25, 1866, ch. 242, § 3, 14 Stat. 240; Act of July 25, 1866, ch. 241, § 1, 14 Stat. 236; Act of July 1, 1862, ch. 120, § 2, 12 Stat. 491.

Second, *Great Northern* cited language providing that a railroad whose right-of-way "passes through a canyon, pass or defile 'shall not prevent any other railroad company'" from also using or occupying that portion of the road. 315 U.S. at 271 (quoting 43 U.S.C. 935). But that language also appeared in a statute granting "a strip of land" rather than a "right-of-way" to the railroad. Act of Feb. 5, 1875, ch. 35, §§ 1, 3, 18 Stat. 306-307. The phrase "strip of land" was generally deemed to suggest the

grant of a fee interest rather than an easement. See *New Mexico*, 172 U.S. at 182 (noting "right-of-way" may be used to refer to a "right of passage" or "to describe that *strip of land* which railroad companies take upon which to construct their roadbed," which is "the land itself—not a right of passage over it") (emphasis modified); see also *Deed to Railroad Company as Conveying Fee or Easement* § 3[b], 6 A.L.R. 3d 973, 978 (1966) (question of interest conveyed turns on "whether the granting clause conveys a *designated strip or piece of land* or whether it basically refers to a right or privilege with respect to the described premises") (emphasis added).[6]

Third, *Great Northern* relied on language providing that the land crossed by the right-of-way shall be disposed of "subject to" the right-of-way. 315 U.S. at 271. But that phrase was also used in statutes granting railroads "a strip of land." See Act of Apr. 12, 1872, ch. 96, § 1, 17 Stat. 52; Act of June 8, 1872, ch. 364, § 1, 17 Stat. 343; Act of Feb. 5, 1875, ch. 35, §§ 1, 2, 18 Stat. 306-307. Moreover, this Court, too, used the phrase "subject to" to indicate that "limited fee" interests are excluded from the conveyance of lands they cross. See *Railroad Co.* v. *Baldwin*, 103 U.S. at 430 (under 1866 statute "all persons acquiring any portion of the public lands, after the passage of the act in question, took the same *subject to* the right of way conferred by it for the proposed road") (emphasis added); *Rio Grande W. R.R. Co.* v. *Stringham*, 239 U.S. 44, 46-47 (1915) (in characterizing 1875 Act rights-of-way as "limited fee" interests, explaining

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[6] The "shall not prevent any other railroad company" language, of course, is not found in pre-1871 statutes that made grants to specific railroads because those grants did not contemplate a need for multiple railroad companies to share a right-of-way.

that the lower court held that the defendants' title "was *subject to* this [limited fee] right of way") (emphasis added).

Furthermore, the legislative history of the 1875 Act reveals no intention to make rights-of-way differ depending on whether they were granted before or after 1871. To the contrary, in presenting the 1875 Act for a vote on the floor of the House of Representatives, the chairman of the responsible committee agreed that, even after the underlying lands were conveyed, the railroad rights-of-way would constitute "property of the United States," just like the rights-of-way granted in the 1862 and 1864 Union Pacific statutes. 3 Cong. Rec. 406 (1875).

c. Congress's intention that the United States retain a reversionary interest in 1875 Act rights-of-way was also made manifest in later statutes. Cf. *Great Northern*, 315 U.S. at 277 ("It is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.'") (quoting *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 309 (1911)). Thus, 43 U.S.C. 940, which was the product of 1906 and 1909 statutes, declares that, where a rail line had not been constructed within five years of the grant of an 1875 Act right-of-way, the right-of-way was "forfeited to the United States" and "the United States resumes the full title to the lands covered thereby free and discharged from such easement." While *Great Northern* relied on Section 940's reference to an "easement," 315 U.S. at 276-277, the Court was not presented with, and did not examine, the language providing for the United States' resumption of title to the right-of-way. Of course, the statute in turn directed the conveyance of that title to the owner of the underlying lands. But there would have been no need to convey the right-of-way if the United States had

not retained any interest in it. See 16 Op. Att'y Gen. 250 (1879) (land within right-of-way in which United States retains no interest vests in owners of tract through which right-of-way passes upon its forfeiture).

In 1922, Congress enacted Section 912, which provided a permanent statutory regime for the forfeiture and abandonment of 1875 Act and other rights-of-way. 43 U.S.C. 912. By providing for the post-abandonment conveyance of rights-of-way crossing private lands to municipalities and for public highways, and by otherwise affirmatively "transfer[ring]" them to owners of the underlying land, Section 912 again demonstrated Congress's understanding that the United States had retained an interest in those rights-of-way. See also 43 U.S.C. 913 (provision enacted in 1920 authorizing railroad companies that had received statutory grants for rights-of-way "to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street"). Finally, with the enactment of 16 U.S.C. 1248(c) in 1988, Congress continued to recognize the United States' reversionary interest in, and its right to control the disposition of, 1875 Act rights-of-way by modifying Section 912 generally to retain the United States' interest in them after they are abandoned.

The question whether the United States retains an interest in 1875 Act rights-of-way is complicated by the changing interpretations of the nature of railroad right-of-way grants made in *Townsend*, *Great Northern*, and *Union Pacific*. But the rationale underlying the court of appeals' decision provides the better view of how to resolve that tension. It eliminates sharp distinctions between pre- and post-1871 rights-of-way and gives effect to congressional intent reflected in Section 912

and the several other statutes in which Congress indicated its understanding that the United States had retained reversionary interests in post-1871 rights-of-way that were similar to those it had retained under their pre-1871 counterparts. Petitioners' reading, in contrast, relies on outdated distinctions among Congress's railroad rights-of-way and nullifies Congress's intent in Sections 912, 913, and 1248(c). The court of appeals correctly held that Section 912 applies to 1875 Act rights-of-way.[7]

2. Petitioners also contend (Pet. 21-25) that the decision conflicts with the holding in *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), that a land patent transfers all title of the United States unless expressly reserved by statute or in the patent. As this Court explained in *Townsend*, however, it was immaterial that a homesteader was granted a full legal subdivision, without an exclusion for the right-of-way in the patent, because the grant of the right-of-way, filing of the map of definite location, and construction of the railroad took it out of the category of public lands subject to pre-emption and sale, so that "homesteaders acquired no interest in the land within the right of way," which reverted to the United States upon abandonment. 190 U.S. at 270, 271. The Seventh and Eighth Circuits have similarly held that the United States retained the reversionary interest

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[7] Even if Section 912 does not apply to all 1875 Act rights-of-way, petitioner's property was not conveyed into private ownership until 1976 (Pet. App. 13)—well after the enactment of Section 912 and the other 1920s statutes indicating that the United States had retained an interest in such rights-of-way—and the underlying railroad was not abandoned until at least 2003 or 2004 (*id.* at 13-14)—well after the 1988 enactment of Section 1248(c) made clear that the reverter would remain in the United States.

in pre-1871 federally granted rights-of-way, without requiring any reservation in the land patent. See *Mauler* v. *Bayfield Cnty.*, 309 F.3d 997, 1000-1002 (7th Cir. 2002), cert. denied, 538 U.S. 1032 (2003); *Rice* v. *United States*, 479 F.2d 58, 59 (8th Cir.), cert. denied, 414 U.S. 858 (1973). In those cases, the courts determined that, by operation of the granting statutes, the United States retained a reversionary interest that did not transfer with the patent. There was accordingly no need for an express reservation of that interest in the patent. See *Swendig* v. *Washington Water Power Co.*, 265 U.S. 322, 332 (1924) (noting that "[t]he issuing of the patents without a reservation did not convey what the law reserved"); *Samuel C. Johnson 1988 Trust* v. *Bayfield Cnty.*, 520 F.3d 822, 831-832 (7th Cir. 2008) (noting that the Executive Branch, unlike Congress, cannot relinquish title to reversionary interests in railroad rights-of-way established by statute). The same principle applies to 1875 Act rights-of-way. See *Stalker* v. *Oregon Short Line R.R. Co.*, 225 U.S. 142, 153 (1912) (upon railroad's filing of map of definite location under 1875 Act, "the grounds so selected were segregated from the public lands"); *Mary G. Arnett*, 20 Pub. Lands Dec. 131 (1895) (1875 Act right-of-way reservation unnecessary in patent because statute provides land is transferred "subject to" the right-of-way).

3. As petitioners note (Pet. 32-33), and as the court of appeals (Pet. App. 5-6) and the district court (*id.* at 26) recognized, the decision below conflicts with the Federal Circuit's decision in *Hash* v. *United States*, 403 F.3d 1308 (2005), which held, in the context of a suit seeking just compensation for a taking under the Fifth Amendment, that the United States did not "retain[]" a "reversionary interest to the land underlying [1875 Act] rights-

of-way after disposing of the land by land grant patent under the Homestead Act." *Id.* at 1318. Moreover, the Seventh Circuit has, in dictum, concluded that *Hash* "make[s] better sense than [the Tenth Circuit's decision in] *Marshall*." *Samuel C. Johnson 1988 Trust* v. *Bayfield Cnty.*, 649 F.3d 799, 803 (2011). By contrast, the Ninth Circuit has, in dictum, agreed with *Oregon Short Line* that Section 912 applies to rights-of-way granted "both before and after 1871." *Vieux* v. *East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1335, cert. denied, 498 U.S. 967 (1990). There is also disagreement in state courts of last resort. Compare *Whipps Land & Cattle Co.* v. *Level 3 Communications, LLC*, 658 N.W.2d 258, 265 (Neb. 2003) (following the Ninth and Tenth Circuits; holding that Section 912 "applies to rights-of-way created pursuant to the 1875 Act" and that "the United States retains all reversionary interests in such rights-of-way"), with *Brown* v. *Northern Hills Reg'l R.R. Auth.*, 732 N.W.2d 732, 740 (S.D. 2007) (finding the United States had no reversionary interest subject to Section 912 in the context of a land patent that was issued before Section 912 was enacted and did not reserve a right in the right-of-way).

That division in authorities has added significance because the Federal Circuit has exclusive jurisdiction over just-compensation claims against the United States, whether they are brought in the Court of Federal Claims or a federal district court. See 28 U.S.C. 1295(a), 1346(a)(2), 1491 (2006 & Supp. V 2011). As a result, a federal district court entertaining a just-compensation claim must, in light of *Hash*, hold that the United States has no reversionary interest in an 1875 Act right-of-way, even though that same district court may hold the oppo-

site when the question is presented outside the context of a just-compensation claim.

4. Whether the United States has reversionary interests in 1875 Act rights-of-way is a question of sufficient importance to warrant this Court's review. Although this Office has been advised that it is rare for the United States to bring a quiet-title action like the one in this case, other disputes about the ownership of 1875 Act rights-of-way—particularly about the application of Sections 912 and 913, which may arise in either federal or state court—arise with some frequency.

Actions involving 1875 Act rights-of-way are often brought against the United States by landowners seeking just compensation for actions taken to preserve railroad rights-of-way for future rail use under the National Trails System Act Amendments of 1983 (Trails Act), Pub. L. No. 98-11, § 208, 97 Stat. 48, which amended the National Trails System Act, 16 U.S.C. 1241 *et seq.* The Trails Act encourages the preservation of railroad rights-of-way by contemplating that a railroad that wishes to cease operations along a particular route may negotiate with a State, municipality, or private group that is prepared to assume financial and managerial responsibility for the right-of-way and any legal liability arising out of that entity's use of the right-of-way. See *Preseault* v. *I.C.C.*, 494 U.S. 1, 6-7 (1990). The Trails Act provides that such use shall not be deemed to be an abandonment of the right-of-way for railroad purposes. *Ibid.* Where railroad rights-of-way are held as typical common-law easements that, but for the Trails Act, would be subject to extinguishment under applicable law if abandoned, that may give rise to a just-compensation claim. *Id.* at 8. Whether a right-of-way is nothing more than a common-law easement is a critical issue in such

claims. Any rail-banked portion of a right-of-way may cross hundreds of properties, and such actions have resulted in numerous class-action suits for just compensation, involving hundreds of individual claims.

To date, thousands of claims pertaining to 1875 Act rights-of-way have been filed. Under current Federal Circuit precedent, the United States will be obligated to pay just compensation on many claims in which ownership of the right-of-way is often a determining factor. Those claims could impose considerable financial liability on the United States and the public fisc, making it appropriate for this Court to review whether the United States holds a reversionary interest in an 1875 Act right-of-way.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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RESPONDENT'S BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Under 43 U.S.C. 912 and 16 U.S.C. 1248(c), when a railroad ceases the use and occupancy of a right-of-way granted to it from the public lands, and the right-of-way's forfeiture or abandonment is declared or decreed by a court of competent jurisdiction or by Act of Congress, all surviving right, title, interest, and estate of the United States shall remain in the United States, except to the extent that any such right-of-way is embraced within a public highway no later than one year after the determination of abandonment or forfeiture. The question presented is:

Whether the United States retains a reversionary interest in rights-of-way granted from public lands to railroads under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. 934-939, such that the disposition of such rights-of-way is governed by 43 U.S.C. 912 and 16 U.S.C. 1248(c).

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is not published in the *Federal Reporter* but is reprinted at 496 Fed. Appx. 822. The opinion of the district court (Pet. App. 10-56) is not published in the *Federal Supplement* but is available at 2008 WL 7185272.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2012. A petition for rehearing was denied on December 26, 2012 (Pet. App. 67-68). The petition for a writ of certiorari was filed on March 22, 2013, and granted on October 1, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The question in this case is whether the United States retains a reversionary interest in a right-of-way granted through public lands under the General Railroad Right-of-Way Act of 1875 (1875 Act), Act of Mar. 3, 1875, ch. 152, 18 Stat. 482 (43 U.S.C. 934-939),[1] when the parcel traversed by the right-of-way has subsequently been conveyed into non-federal ownership. Section 1 of the 1875 Act specifies that "[t]he right of way through the public lands of the United States is granted to any railroad company * * * [that has met certain requirements], to the extent of one hundred feet on each side of the central line of said road" plus station "ground[s] adjacent" thereto. 43 U.S.C. 934. Those adjacent grounds are for "station buildings, depots, machine shops, side tracks, turnouts, and water stations," and are limited to "twenty acres for each station" and "one station for each ten miles of [the] road." *Ibid.*

a. The text of the 1875 Act's right-of-way provision was drawn from prior statutes that conveyed two distinct types of property interests to railroads. The first type of interest conveyed by predecessor statutes was a right-of-way through public lands. This Court has concluded that a grant of a right-of-way under those earlier statutes was "more than an ordinary easement" and had certain "attributes of [a grant in] fee." *New Mexico* v. *United States Trust Co.*, 172 U.S. 171, 183 (1898). "In effect," the Court explained, the statutory grant of the right-of-way conveyed "a lim-

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[1] Congress repealed the 1875 Act effective October 21, 1976, insofar as it applies to the issuance of rights-of-way through public and National Forest System lands. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2793.

ited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Northern Pac. Ry.* v. *Townsend*, 190 U.S. 267, 271 (1903). Upon "the grant of the right of way," "the land forming the right of way * * * was taken out of the category of public lands subject to preëmption and sale, and the land department was therefore without authority to convey rights therein" to others. *Id.* at 270.

The second type of interest conveyed in predecessor statutes was a separate, generous grant of land that a railroad company could sell to offset the cost of constructing its railroad. Such land-grant subsidies originated in the canal era and, by 1850, were "employed for the subsidization of * * * railroad[s]." *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672-673 & nn.7-8 (1979). The subsidies took the form of a "'checkerboard' land-grant scheme" in which the United States would grant a railroad company every other one-square-mile section of public land extending out from both sides of the railroad for each mile of railroad it constructed. *Id.* at 672-673.[2]

Two significant land-grant statutes are illustrative: the 1862 Union Pacific Act (as amended in 1864) and the 1864 Northern Pacific Act.

i. The Union Pacific Act established the Union Pacific Railroad Company to build the eastern leg of a line that would later be linked with the western portion from Sacramento by a golden spike at Promonto-

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[2] A section is a one-square-mile (640-acre) unit of land, which can be subdivided into smaller parcels. *Papasan* v. *Allain*, 478 U.S. 265, 268 n.3 (1986).

ry, Utah, to form the Nation's first transcontinental railroad. *Leo Sheep Co.*, 440 U.S. at 676-677.

That Act directed that "the right of way through the public lands be * * * granted to [Union Pacific] for the construction of [the] railroad * * * to the extent of two hundred feet in width on each side of said railroad * * * , including all necessary [station] grounds." Act of July 1, 1862 (1862 U.P. Act), ch. 120, § 2, 12 Stat. 491. The Act as amended also authorized the railroad to "enter upon, purchase, take, and hold" any privately held "lands or premises" up to 100 feet from the railroad's centerline when "necessary and proper for the construction and working of [its] road," and other land "required in [such] construction and operati[on]." Act of July, 2, 1864 (1864 U.P. Act), ch. 216, § 3, 13 Stat. 357. The Act provided a condemnation procedure that allowed the railroad to "acquire full title to the [property]" for railroad purposes. *Ibid.* (reproduced in part within 43 U.S.C. 942–3).

The Union Pacific Act separately provided a checkerboard land-grant subsidy of half the land in a 40-mile-wide band surrounding the railroad, consisting of "every alternate section of public land * * * to the amount of ten alternate sections per mile on each side." 1862 U.P. Act § 3, 12 Stat. 492, as amended by 1864 U.P. Act § 4, 13 Stat. 358. Under that provision, the United States granted Union Pacific and its associated railroads roughly 34.56 million acres (54,000 square miles) of public land—more land than all of New York or Virginia—to subsidize 2720 miles of railroad. Paul W. Gates, *History of Public Land Law Development* 367 (1968) (*Public Land*); *Atlas of North America* 151, 164 (H.J. de Blij ed. 2005). By compari-

son, a 400 foot-wide right-of-way for 2720 miles of road covers only 206 square miles of land.

ii. The 1864 Northern Pacific Act was similar. It specified that "the right of way through the public lands be * * * granted to [the railroad] for the construction of a railroad * * * to the extent of two hundred feet in width on each side * * *, including all necessary [station] ground[s]." Act of July 2, 1864 (1864 N.P. Act), ch. 217, § 2, 13 Stat. 367. It further authorized the railroad to secure private lands by a condemnation proceeding and "acquire full title" to such property. § 7, 13 Stat. 369. Like the Union Pacific Act, the Northern Pacific Act included a separate land-grant subsidy. 1864 N.P. Act § 3, 13 Stat. 367. That subsidy for building 2128 miles of railroad was an estimated 45 million acres (70,300 square miles) of land to sell, including 23% of North Dakota and 15% of Montana. *Public Land* 374-375. By comparison, a 400-foot-wide right-of-way for 2128 miles of road covers only 161 square miles.

b. By the early 1870s, railroads had become eligible for about 127 million acres of land-grant subsidies. See *Public Land* 380, 396, 455; cf. *id.* at 385 (the United States ultimately granted 94.36 million acres of public lands to railroads). In light of indications that railroads were slow to sell their lands and a fear of "land monopoly," the public "began to demand * * * an end to the practice of making land grants" and later sought "the forfeiture of unearned grants, partially earned grants, and, finally, unsold grants." *Id.* at 380, 454-456; see Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 U. Colo. L. Rev. 85, 126-129 (2011) (*Roberts*); see also,

e.g., *Public Land* 365-366, 371-372, 375, 397-398, 460-461. In 1871, Congress enacted the last railroad land-grant statute. *Id.* at 376-377, 456; *Roberts* 132-134 & n.279.

c. The General Railroad Right-of-Way Act of 1875 parted ways from land-grant statutes by omitting any land subsidy. But the Act adopted the same language used in the earlier statutes to convey railroad rights-of-way. Section 1 of the Act, as noted, provides that "[t]he right of way through the public lands of the United States is granted to any railroad company * * * [meeting certain requirements], to the extent of one hundred feet on each side of the central line of said road" plus station "ground[s] adjacent" thereto. 43 U.S.C. 934. Section 3 provides that a railroad may condemn "private lands and possessory claims on the public lands" as provided by the law of the relevant Territory. 43 U.S.C. 936. In the absence of a territorial law, the Act directs (*ibid.*) the railroad to use the condemnation process in Section 3 of the 1864 Union Pacific Act, which permits a railroad to "acquire full title" to the property. 13 Stat. 357.

The 1875 Act "enables the railroad company to secure the grant" of its right-of-way by the "actual construction of its road." *Jamestown & N. R.R.* v. *Jones*, 177 U.S. 125, 130-131 (1900). But the Act also permits a company to do so "in advance of construction by filing a map as provided in section 4." *Id. at* 131; see *Stalker* v. *Oregon Short Line R.R.*, 225 U.S. 142, 147, 152-153 (1912). Section 4 provides that a company "secure[s]" the benefits of the Act by filing a profile map of its rail corridor with the local Interior Department land office within 12 months after survey or location of the road and that, upon Interior's approval,

the right-of-way is to be noted on the plats at that office. 43 U.S. 937. Thereafter, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." *Ibid.* Under Section 4, Interior's approval "segregate[s] [the right-of-way] from the public lands" and "withdraw[s] the land so granted from the market." *Stalker*, 225 U.S. at 153.

Finally, Section 6 expressly "reserves" Congress's "right at any time to alter, amend, or repeal [the 1875 Act], or any part thereof." 43 U.S.C. 939.

d. In 1906 and 1909, Congress enacted two statutes that declare as "forfeited to the United States" every right-of-way granted under the 1875 Act for which (as of the date of each statute) the section of railroad had not been constructed within the 1875 Act's five-year deadline, 43 U.S.C. 937. See 43 U.S.C. 940. Upon forfeiture of a right-of-way, "the United States resumes full title to the lands covered thereby free and discharged from such easement." *Ibid.* Each declared forfeiture would then, without the need of further assurance or conveyance, "inure to the benefit" of any owner of land that had been conveyed by the United States "subject to any such grant of right of way" before the 1906 or 1909 enactment dates. *Ibid.*

In 1922, Congress enacted the Railroad Right-of-Way Abandonment Act, Act of Mar. 8, 1922, ch. 94, 42 Stat. 414 (43 U.S.C. 912), to address forfeiture and abandonment of federally granted railroad rights-of-way. Congress specifically intended Section 912 to apply to rights-of-way granted under the 1875 Act. See S. Rep. No. 388, 67th Cong., 2d Sess. 1-2 (1922). Under Section 912, any railroad that was granted a right-of-way from the public lands would relinquish that right-of-way when it ceased its use and occupancy

of such lands for railroad purposes by "forfeiture" or "abandonment," as "declared or decreed by a court of competent jurisdiction or by Act of Congress." 43 U.S.C. 912. Upon such a declaration or decree, "all right, title, interest, and estate of the United States in said lands" composing the right-of-way were to be transferred to the owner of the property traversed by the right-of-way, unless the right-of-way was either embraced in a public highway established within one year or was located within a municipality. *Ibid.* Under any alternative, however, Section 912 reserved to the United States "oil, gas, and other minerals in the land so transferred." *Ibid.*

In 1988, Congress abrogated Section 912's provision for the transfer of an abandoned right-of-way to the owner of the parcel surrounding it. 16 U.S.C. 1248(c). Section 1248(c) continues to permit a public highway to be established on a right-of-way within a year after a decree or declaration of abandonment, but it otherwise provides that, "[c]ommencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in [43 U.S.C. 912] shall remain in the United States." *Ibid.*

2. This case involves a stretch of railroad right-of-way in southern Wyoming granted under the 1875 Act to the Laramie, Hahn's Peak and Pacific Railroad Company in 1908, when all of the surrounding land was federal or state land. Pet. App. 11, 13; Gov't C.A. Br. 8. The right-of-way crossed an 83-acre parcel that, in 1976, was patented to petitioners' predecessor in interest. J.A. 19. In 2004, the successor railroad abandoned the relevant rail line after obtaining the

Surface Transportation Board's approval. Pet. App. 13-14.

In 2006, the United States filed this action to quiet title to a stretch of the right-of-way in order to extend a pre-existing recreational trail across it. Pet. App. 11; Gov't C.A. Br. 7-8. Consistent with 43 U.S.C. 912 and 16 U.S.C. 1248(c), the United States sought a declaratory judgment that the right-of-way was abandoned, and that all right, title, and interest in it therefore vested in the United States. The United States filed the suit against 52 defendants. Gov't C.A. Br. 3. With the exception of petitioners, all of the other landowner defendants entered into non-monetary settlements with the United States or failed to appear and had default judgments entered against them. *Ibid.*; Pet. App. 12. Petitioners filed several counterclaims, including a claim to quiet title to the right-of-way in them. Pet. App. 12.

The district court declared the right-of-way abandoned and quieted title in the United States. Pet. App. 57-59. The court concluded, based on Tenth Circuit precedent, that "the United States retains a reversionary interest in all 1875 Act [rights-of-way]." *Id.* at 26 (citing *Marshall* v. *Chicago & Nw. Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994)). The district court further held that, upon the court's declaration of abandonment pursuant to 43 U.S.C. 912, the right-of-way reverted to the United States pursuant to 16 U.S.C. 1248(c). Pet. App. 29-30.

3. The court of appeals affirmed, Pet. App. 1-9, concluding that this case was controlled by its precedent in *Marshall*, *id.* at 5-6. The defendants in *Marshall* contended, as petitioners do here, that Section 912 did not apply to the 1875 Act right-of-way because

the United States retained no right, title, or interest in it, relying in large part on the characterization of an 1875 Act right-of-way as an "easement" in *Great Northern Railway* v. *United States*, 315 U.S. 262 (1942). See *Marshall*, 31 F.3d at 1031.

Marshall rejected that contention. 31 F.3d at 1031. In doing so, *Marshall* relied on a historical analysis of some 100 years of case law under various statutes pertaining to federally granted railroad rights-of-way set forth in prior Tenth Circuit decisions such as *Wyoming* v. *Udall*, 379 F.2d 635, cert. denied, 389 U.S. 985 (1967), and in *Idaho* v. *Oregon Short Line Railroad*, 617 F. Supp. 207 (D. Idaho 1985). After reviewing that history and the underlying statutes, *Oregon Short Line*—which was followed by *Marshall*, 31 F.3d at 1032—concluded that, although Congress "did not intend [in the 1875 Act] to convey to the railroads a fee interest in the underlying lands," it did intend to convey a right-of-way that "carried with it the right to exclusive use and occupancy of the land," which goes beyond "a simple easement" "under traditional rules." 617 F. Supp. at 212. The court further observed that "Congress clearly felt that it had some retained interest in railroad rights-of-way" when it enacted Section 912 and similar provisions, *ibid.*, which did not need to be "shoe-horned into any specific category cognizable under the rules of real property law." *Marshall*, 31 F.3d at 1032 (quoting *Oregon Short Line*, 617 F. Supp. at 212). Thus, the *Marshall* court concluded, even assuming that the 1875 Act granted only easements, Congress intended to retain rights or interests in those easements, such that Section 912 applies to

them. See *id.* at 1032; *Oregon Short Line*, 617 F. Supp. at 212-213.[3]

Finding *Marshall*'s reasoning to be controlling, the court of appeals concluded that "the district court correctly held that the interest in the abandoned railroad right-of-way belongs to the United States." Pet. App. 6. It accordingly affirmed the decision to quiet title in favor of the United States. *Id.* at 9.

SUMMARY OF ARGUMENT

The United States retains a reversionary interest in abandoned railroad rights-of-way granted under the 1875 Act. When the district court declared the right-of-way in this case abandoned, it thus properly quieted the right-of-way's title in the United States.

1. The 1875 Act grants to a railroad company "the right of way" through the public lands of the United States. That grant confers a substantial property interest that carries some characteristics of a limited grant of the surface in "fee" and, in other respects, confers rights analogous to those conferred by an "easement." But Congress used neither term in the 1875 Act, and a proper construction of the Act must determine the scope of the rights conferred by the "right of way" in light of the particular right in question and the parties whose interests are implicated. Here, the statutory text, this Court's prior decisions, the legislative history, and subsequent Acts of Congress show that the 1875 Act's grant of a right-of-way preserves a reversionary interest in the right-of-way

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[3] *Marshall* was decided after Section 1248(c) modified Section 912 to retain the United States' interests in abandoned railroad rights-of-way, but it failed to address Section 1248(c)'s application to the case, in which the United States was not a party.

land for the United States in the event that the railroad later forfeits or abandons the right-of-way.

a. The 1875 Act's relevant text granting the statutory right-of-way is materially identical to that of prior railroad right-of-way statutes that this Court has concluded provide the United States with a reversionary interest in the right-of-way that will vest the relevant lands in the United States if a railroad forfeits the right-of-way. It is well settled that such statutes should be read *in pari materia*. Moreover, this Court has concluded in the context of predecessor statutes that practical considerations surrounding the nature of a railroad right-of-way require that the right-of-way exhibit certain characteristics of a fee interest and not a bare common-law easement. Congress would have recognized the importance of granting a railroad exclusive, continuous, and perpetual control over its right-of-way, and there is no indication that Congress intended the 1875 Act to provide inferior rights to railroads in that respect. Indeed, the 1875 Act specifically authorizes a railroad to condemn private lands within the path of its line and obtain "full title" to those private lands. In this context, it would be anomalous to interpret the Act's grant of a right-of-way across public lands as providing the rights of only a bare easement in every respect.

b. This Court's decisions in *Stalker* v. *Oregon Short Line Railroad*, 225 U.S. 142 (1912), and *Great Northern Railway* v. *Steinke*, 261 U.S. 119 (1923), establish that when public lands are conveyed "subject to" an 1875 Act right-of-way, the patent conveys no interest in the right-of-way land. In those cases, the Court determined that Interior's approval of a railroad's map under the 1875 Act is "the equivalent of a

patent," which withdraws the land granted as a right-of-way from the market and makes any subsequently issued patent for a parcel containing the right-of-way "'inoperative to pass title'" to the right-of-way to third parties. *Steinke*, 261 U.S. at 125, 131 (quoting *Stalker*, 225 U.S. at 154); *Stalker*, 225 U.S. at 153. Those decisions establish that petitioners could not obtain any interest in the right-of-way by patent and reflect that it is the United States that retains a reversionary interest in the right-of-way.

c. That conclusion is reinforced by the legislative debate and by subsequent Acts of Congress that make manifest Congress's intent that the United States retain that reversionary interest. In 1906 and 1909, Congress enacted statutes to govern forfeitures of 1875 Act rights-of-way, and those provisions make clear that, upon a declaration of forfeiture, "the United States resumes full title to the lands covered" by the right-of-way. 43 U.S.C. 940. In 1922, Congress enacted Section 912 to govern such right-of-way forfeitures on an ongoing basis and specified how the government would dispose of the "right, title, interest, and estate of the United States in said [right-of-way] lands" upon forfeiture. 43 U.S.C. 912. And in 1988, Congress modified that disposition of the United States' interests by specifying that, with one limited exception, the United States would retain its reversionary interest in forfeited rights-of-way. 16 U.S.C. 1248(c).

2. Petitioners primarily rely on *Great Northern Railway* v. *United States*, 315 U.S. 262 (1942), to support their contention that 1875 Act rights-of-way are "[no]thing but common law easements," which, at common law, would terminate when abandoned and

leave the full fee interest to the holder of a land patent for the parcel containing the right-of-way. We acknowledge that there is language in this Court's opinion in *Great Northern*, and in the government's brief in that case, that lends some support to petitioners' contrary position. But *Great Northern* involved whether the grant of the right-of-way to the railroad company conveyed to it the title to minerals underlying the right-of-way as against the United States; it did not involve the distinct questions in this case concerning the United States' reversionary interest in the right-of-way itself on the surface and the respective interests of the United States and third-party patentees when the railroad abandons the right-of-way. It has long been understood that expressions in every opinion must be read in the context in which they are used, and *Great Northern*, in our view, should not be read to control this case or reject the numerous reasons for concluding that the 1875 Act preserves a reversionary interest for the United States in a forfeited or abandoned right-of-way.

The Court in *Great Northern* was heavily influenced by Congress's decision to halt general land grants to subsidize railroads, and that change was important to deciding whether Congress intended to bestow railroads with similar mineral riches. The surface interest in a right-of-way that is forfeited once the railroad no longer provides ongoing public benefits implicates entirely different considerations.

Great Northern's statutory analysis, moreover, does not purport to address the question in this case, much less resolve it against the government. To the contrary, *Great Northern*'s reliance on Section 940's characterization of a 1875 Act right-of-way as an

"easement" demonstrates that the Court could not have used the term "easement" (as petitioners do) to mean that such rights-of-way must be treated as common-law easements in all respects, because Section 940 confirms that the government obtains "full title" to the land embraced by the right-of-way, free of the "easement" granted to the railroad, upon forfeiture by the railroad, even when it has conveyed a parcel containing the right-of-way into private ownership. Had the Court intended to address the question of a reverter to the United States upon a railroad's forfeiture or abandonment of its right-of-way, it presumably would have discussed Section 912. The Court simply had no occasion to do so.

Great Northern's favorable citations to this Court's 1875 Act decisions in *Stalker* and *Steiner* reinforce the conclusion that the Court did not perceive any inconsistency between its decision and those cases, which demonstrate that Interior's approval of a railroad's map withdraws the land so granted from the public lands available for transfer to third parties and thereby renders any subsequent patent inoperable to pass title to the right-of-way lands. Petitioners' suggestion that *Great Northern* overruled *Stalker sub silencio* is without merit. Indeed, given the special respect that is owed to this Court's statutory precedents and Congress's multiple enactments confirming the United States' reversionary interest in 1875 Act rights-of-way, the proper course in this case is to confirm the United States' ongoing interest in rights-of-way granted under that Act.

ARGUMENT

THE UNITED STATES RETAINS TITLE TO THE ABANDONED RIGHT-OF-WAY GRANTED UNDER THE 1875 ACT IN THIS CASE

The General Railroad Right-of-Way Act of 1875, 43 U.S.C. 934-939, grants to a railroad company "[t]he right of way through the public lands of the United States." 43 U.S.C. 934. That grant confers a substantial property interest that, in some respects, carries characteristics of a limited grant of the surface in "fee." In other respects, the right-of-way confers rights analogous to those conferred by an "easement." But Congress used neither term in the 1875 Act's text. It therefore is necessary to determine in any particular context the characteristics of this distinctive right-of-way grant insofar as it affects the interests of the railroad, the United States, and third parties who may have received a patent to a tract of land crossed by the right-of-way.

The 1875 Act's text, this Court's decisions construing that Act, the legislative history surrounding its enactment, and subsequent Acts of Congress demonstrate that the 1875 Act's grant of a right-of-way across public lands preserves a reversionary interest in that land for the United States in the event that the railroad to which the grant was made later forfeits or abandons the right-of-way. The United States thereby preserves its ability at that time to determine whether the right-of-way should continue to be retained for railroad or other transportation uses or other public purposes on which the adjacent communities may depend.

We acknowledge that there is language in this Court's opinion in *Great Northern Railway* v. *United*

States, 315 U.S. 262 (1942), and in the government's brief in that case, that lends some support to petitioner's contrary position. But *Great Northern* involved whether the grant of the right-of-way to the railroad company conveyed to it the title to minerals underlying the right-of-way as against the United States. It did not involve the distinct questions in this case concerning the United States' reversionary interest in the right-of-way itself on the surface and the respective interests of the United States and third-party patentees when the railroad abandons the right-of-way. *Great Northern* therefore does not control this case, and as explained below, the 1875 Act does preserve a reversionary interest for the United States in the right-of-way.

A. Congress Preserved A Reversionary Interest In 1875 Act Rights-Of-Way For The United States

1. The text of the 1875 Act shows that Congress provided the United States with a reversionary interest in rights-of-way under that Act

Section 1 of the 1875 Act provides that "[t]he right of way through the public lands of the United States is granted to any railroad company" that has met certain requirements, "to the extent of one hundred feet on each side of the central line of said road" and certain station "ground[s] adjacent" thereto. 43 U.S.C. 934. This Court has long recognized that the "term 'right of way'" can be used both to refer to "'a right of passage over any tract'" of land and to refer to "the land itself." *New Mexico* v. *United States Trust Co.*, 172 U.S. 171, 182 (1898) (quoting *Joy* v. *St. Louis*, 138 U.S. 1, 44 (1891)).

With respect to the 1875 Act, however, Congress did not write on a clean slate. Congress instead incor-

porated materially identical text from prior railroad right-of-way statutes. See Act of July 27, 1866, ch. 278, § 2, 14 Stat. 294 (Atlantic and Pacific Railroad); see also, *e.g.*, Act of Mar. 3, 1871, ch. 122, § 8, 16 Stat. 576 (Texas Pacific Railroad); Act of July 26, 1866, ch. 270, § 6, 14 Stat. 290 (Union Pacific Railroad, Southern Branch); Act of July 25, 1866, ch. 242, § 3, 14 Stat. 240 (California and Oregon Railroad); 1864 N.P. Act § 2, 13 Stat. 367; 1862 U.P. Act § 2, 12 Stat. 491.

It was settled in 1875 that such acts on the same "subject * * * constitute a common context" and thus should be read "*in pari materia*, * * * as if [they were] embraced in the same statute." *James* v. *Milwaukee*, 83 U.S. (16 Wall.) 159, 161 (1872). As such, Congress would have expected that "if [it employed] the same word" in statutes that "are *in pari materia*," the courts would presume that Congress "intended it should receive the same interpretation" absent a contrary showing in the statute itself. *Reiche* v. *Smythe*, 80 U.S. (13 Wall.) 162, 165 (1872). That principle reflects "practical experience" showing that "a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972); see *Wachovia Bank, N.A.* v. *Schmidt*, 546 U.S. 303, 315-316 (2006).

As explained below, this Court has held that the 1875 Act's predecessor statutes confer substantial property rights on the railroad as against third parties and preserve to the United States an implied reversionary interest in the right-of-way in the event that the railroad later forfeits or abandons it. The Congress that enacted the 1875 Act would have intended it to do the same.

a. The "phrase 'the right of way'" in such predecessor statutes, this Court held more than a century ago, is not a "mere right of passage" but instead—if not tantamount to the grant of a fee in land—reflects a type of easement "'peculiar to the use of a railroad'" that has certain "attributes of the fee." *United States Trust Co.*, 172 U.S. at 181, 183 (citation omitted); see *Western Union Tel. Co.* v. *Pennsylvania R.R.*, 195 U.S. 540, 570 (1904) (describing right-of-way as like "a fee in the surface and so much beneath as may be necessary for support") (citation omitted). That interpretation flowed from multiple considerations.

i. First, this Court in *United States Trust Co.* explained that statutory text granting rights-of-way does not simply use the "phrase 'the right of way'"; it confers something that "is exactly measured as a physical thing—not as an abstract right." 172 U.S. at 181; see *id.* at 177 n.1 (1866 Act). The text instructs that the grant "is to be two hundred feet wide, and to be carefully broadened so as to include grounds for the superstructures indispensable to the railroad." *Id.* at 181. The 1875 Act is precisely the same: It defines the extent of general right-of-way lands conveyed to be 200 feet wide and expands that width for station grounds as "local extensions of the general right of way," *Great Northern Ry.* v. *Steinke*, 261 U.S. 119, 132 (1923).

The right-of-way could not, of course, be "limited to the width of the track and cars." *South Perry Townsite* v. *Reed*, 28 Pub. Lands Dec. 561, 562 (1899). As a practical matter, it "must be wide enough for the track and the embankment" below or, in the case of cuts into slopes, above the track. Am. Ry. Eng'g & Maint. of Way Ass'n, *Practical Guide to Railway Engineer-*

ing § 4.2.1, at 153 (2003) (*Practical Guide*); see 65 Am. Jur. 2d *Railroads* § 66, at 249 (2011) (Right-of-way confers "the right to tunnel the land, to cut embankments, to grade and make roadbeds."). It should provide sufficient space for access roads, ditches, and structures necessary to operate the railway; room for maintenance and construction activity on functional lines; and, when appropriate, land for future expansion (*e.g.*, double tracking). *Practical Guide* § 4.2.1, at 153; 1 William W. Hay, *Railroad Engineering* 196-197 (1953). In areas of significant snowfall and wind, a right-of-way of sufficient width is necessary to accommodate snow plowed from the tracks and snow fences located at an appropriate distance to reduce accumulation on tracks, ditches, and rail crossings. *Practical Guide* § 4.2.2, at 153; cf. *Northern Pac. Ry.* v. *Townsend*, 190 U.S. 267, 269 (1903) (snow fences 100 feet from tracks).

Congress would have recognized that rights-of-way with such characteristics were essential to advance the public interest in providing railroad transportation in the late 1800s. See *Townsend*, 190 U.S. at 272 ("Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance."). Indeed, this Court has determined that railroad companies receiving statutory grants of rights-of-way may not dispose of any land within the minimum statutory width without statutory authorization. See *Northern Pac. Ry.* v. *Ely*, 197 U.S. 1, 5-7 (1905); see also *Steinke*, 261 U.S. at 132 (1875 Act right-of-way is for "*quasi* public uses" specified by Congress and is not available for "private use or disposal"). That restriction ensures that right-of-way lands continue to be available to facilitate safe

and efficient rail operations serving the public interest.

The public purposes reflected in that restriction, and in the very grant of the right-of-way, also strongly support the conclusion that the United States retains a reversionary interest in the right-of-way if it is abandoned by the railroad company. The United States thereby preserves its ability to determine at that time whether the public interest requires that the area of the right-of-way continue to be devoted to railroad or other transportation use or other public purposes, or whether it should instead be transferred unencumbered to private ownership.

ii. Second, this Court concluded in *United States Trust Co.* that statutory grants of rights-of-way "surely [confer] more than an ordinary easement" by virtue of the nature of their intended operation. 172 U.S. at 183. Even if a statutory right-of-way is deemed a type of easement, the Court reasoned, it must logically have certain "attributes of the fee"—"perpetuity and exclusive use and possession"—and "also the remedies of the fee." *Ibid.*

As traditionally understood, a "grant of the exclusive use of land is not an easement," Leonard A. Jones, *A Treatise on the Law of Easements* § 14, at 12 (1898) (*Easements*), because an "easement" would not authorize "the entire beneficial occupation and improvement of the land," *United States Trust Co.*, 172 U.S. at 183. Yet a railroad's use of right-of-way land is necessarily "perpetual and continuous," *ibid.*, and "is, and necessarily must be, exclusive," *Choctaw,*

Okla. & Gulf R.R. v. *Mackey*, 256 U.S. 531, 539 (1921).[4]

A railroad company must also have the ability to protect its right-of-way, which constitutes "private property even to the public" and "cannot be invaded without guilt of trespass." *Western Union*, 195 U.S. at 570; see *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279, 294-295 (1905). The owner of a true common-law easement, by contrast, "is not entitled to the protection which is given to those having possessory interests" and cannot "exclude others from making any use of the land which does not interfere with his." 5 Restatement (First) of Property § 450 cmt. b, at 2903 (1944) (*Restatement*); see *id.* § 510 illus. 5, at 3106-3107. Easements were thus viewed at common law as purely "incorporeal interests" given their owners' "slight degree of control" compared to that of "possessors of land." *Id.* § 450 cmt. c, at 2903. But the remedies that have long been available to a railroad to protect its right-of-way are those of "corporeal, not incorporeal, property." *United States Trust Co.*, 172 U.S. at 183.

Accordingly, even if a federally granted right-of-way might "technically [be labeled] an easement," the Court held that it is not the type of easement "spoken of in the old law books, but is peculiar to the use of a railroad." *United States Trust Co.*, 172 U.S. at 183 (citations omitted). Such a right-of-way "is a very substantial thing" and must share by necessity certain traits of a limited "fee in the surface and so much

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[4] In certain limited stretches within canyons, passes, or defiles, a right-of-way grant under the 1875 Act must be shared with other railroads. See 43 U.S.C. 935. But that cooperation between railroads does not affect the authority to exclude all others.

beneath as may be necessary for support." *Western Union*, 195 U.S. at 570; see *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 119 (1957).

iii. Reflecting these significant attributes, "the rights of way conveyed" in the statutes from which the 1875 Act directly drew its text of conveyance were "held [by this Court] to be limited fees"—or at least held to have certain characteristics of limited fees—in particular contexts. See *Great Northern Ry.*, 315 U.S. at 273 n.6 (citing *Townsend*, *supra*). The Court explained in *Townsend* that when a railroad obtains a statutory right-of-way through public lands, "the land forming the right of way * * * [is] taken out of the category of public lands subject to * * * sale, and the land department [i]s therefore without authority to convey rights therein" to others. *Townsend*, 190 U.S. at 270. Congress, the Court reasoned, thereby granted the railroad "perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." *Id.* at 271. Thus, the predecessor statutory provisions granting "the right of way through the public lands" was to be understood as conveying, "[i]n effect," a type of "limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Ibid.*; see *id.* at 268 (quoting 1864 N.P. Act § 2, 13 Stat. 367); cf. *United States* v. *Michigan*, 190 U.S. 379, 398 (1903) (same for 1852 canal right-of-way act).

b. Nothing in the text or purposes of the 1875 Act suggests that any different result is warranted with respect to the existence of a condition of reverter to

the United States in its grant of railroad rights-of-way through public lands. To the contrary, the operative statutory text was, as explained above, drawn directly from such predecessor provisions. See 43 U.S.C. 934; *Wyoming* v. *Udall*, 379 F.2d 635, 638 (10th Cir.) (the text is "identical in all important respects"), cert. denied, 389 U.S. 985 (1967).

Nor is there anything elsewhere in the 1875 Act suggesting that Congress intended the rights-of-way granted under it to lack the essential features discussed above that were recognized under identically worded predecessor statutes. Congress would not have intended holders of 1875 Act rights-of-way to be less able to defend the land granted from invasion by third parties. Nor are the track and structures laid and physical modifications made in an 1875 Act right-of-way less continuous and permanent than those in earlier rights-of-way. And the 1875 Act, like its predecessors, grants perpetual rights-of-way, subject to the condition that the railroad grantee use it for statutory purposes. See *Steinke*, 261 U.S. at 132 (1875 Act imposes "the implied condition that [the right-of-way] be devoted to [statutory] uses," and a "breach of the condition subjects the grant to a forfeiture by the United States").

c. Section 3 of the 1875 Act reinforces that conclusion. It provides that, in the absence of a territorial law governing the condemnation of "private lands and possessory claims on the public lands" needed for the railroad, such condemnation may be made in accordance with Section 3 of the 1864 Union Pacific Act. See 43 U.S.C. 936. The 1864 provision, in turn, expressly authorizes a railroad company to "acquire full title" to "any lands or premises that may be necessary and

proper" for "the construction and working of said road, not exceeding in width 100 feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment," and railroad stations and other structures "required in the construction and operating of said road." 1864 U.P. Act § 3, 13 Stat. 357 (partially reproduced within 43 U.S.C. 942-3).

Congress thus expressly contemplated that the railroad could acquire the full title to the land and possessory claims necessary for railroad operations where its 200-foot-wide right-of-way passes through private lands and through public lands encumbered by "possessory claims," 43 U.S.C. 936, *i.e.*, "homestead or similar claims" to public lands reflecting "inchoate or possessory rights" that have not ripened to vest title in the claimant. See *Steinke*, 261 U.S. at 127 (interpreting Section 3 of 1875 Act); *Spokane Falls & N. Ry.* v. *Ziegler*, 167 U.S. 65, 68, 70 (1897) (discussing condemnation of private land for full value of right-of-way land under 1875 Act); cf. *Shiver* v. *United States*, 159 U.S. 491, 495-496 (1895) (explaining requirements to obtain patent for homestead).

The Senate debate focused attention on what would become Section 3 of the 1875 Act (then Section 9 of S. 378). 2 Cong. Rec. 2898-2900 (1874); see *id.* at 2897 (reproducing Section 9). The Senators recognized that the condemnation provision would enable railroads to "acquire full title" and "not a mere easement" to the premises. See, *e.g.*, *id.* at 2899 (statement of Sen. Wright). The Chairman of the Senate Committee on Railroads who reported the bill, *id.* at 2896, explained that a railroad company would acquire "title" for "the right of way" under the provision but that, if

the company later failed to "build a railroad," it would "forfeit" that "title" under the bill's forfeiture provision. *Id.* at 2900 (statement of Sen. Stewart); cf. 43 U.S.C. 937 (providing that, if rail line is not completed within five years, company will forfeit rights granted by 1875 Act as to any "uncompleted section of said road"). Because Congress intended railroads to be able to acquire "full title" to private lands within a 200-foot-wide right-of-way subject to forfeiture to the United States if the rail line was not built, it would be anomalous to interpret the 1875 Act's grant of a 200-foot-wide right-of-way through public lands not to confer a sufficient interest on the company to construct and operate the railroad and to preserve a reversionary interest in the United States.

d. Petitioners resist that conclusion and contend (Br. 19-20) that the 1875 Act confers nothing more than a bare "easement" for all purposes and in all respects. Petitioners rely on Section 4 of the Act, which provides that, once Interior approves a profile map of a line through surveyed or unsurveyed lands, "all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way," 43 U.S.C. 937 (petitioners' emphasis). That language, petitioners contend, indicates an "intent to convey an easement" and is "wholly inconsistent with the grant of a fee." Br. 20 (quoting *Great Northern*, 315 U.S. at 271). But materially identical statutory text is present in numerous predecessor right-of-way provisions that petitioners attempt to distinguish from the 1875 Act. Such statutes routinely defined the government's grant of "the right of way *through* the public lands" by stating that "said right of way is granted * * * to the extent of [a specified] width * * * where it

may pass *over* the public lands." 1862 U.P. Act § 2, 12 Stat. 491 (emphasis added).[5] In this context, the term "over" can be understood as simply a synonym for "through." *Webster's New International Dictionary* 1533 (1917) (defining "over" to mean "[a]cross" or "through"). But in any event, that term does not address the question of reverter of the right-of-way to the United States if it be abandoned by the railroad.

The directive that the lands over which a right-of-way passes shall be disposed of "subject to" such right-of-way, 43 U.S.C. 937, likewise does not address to the question of reverter to the United States. The right-of-way granted by the 1875 Act is 200 feet wide, 43 U.S.C. 934, and it therefore will normally cover only a portion of the parcels of land over which it crosses. Cf., *e.g.*, J.A. 21 (map of parcel in this case). Disposing of the larger parcel of land "subject to" the right-of-way merely reflects the fact that the covered lands were previously committed to the railroad, such that the government conveys only the remainder. Nothing in that text suggests that the United States does not retain a reversionary interest in the right-of-way itself.

This Court in fact has used the phrase "subject to" to indicate that rights-of-way granted under pre-1872 Acts are excluded from the conveyance of lands they cross. See, *e.g.*, *Bybee* v. *Oregon & Cal. R.R.*, 139 U.S. 663, 680 (1891) (A person acquiring land containing "any part of such right of way [granted by an 1866 statute] takes it *subject to* the prior right of the rail-

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[5] See also, *e.g.*, Act of Mar. 3, 1871, ch. 122, § 8, 16 Stat. 576 (Texas Pacific Railroad); Act of July 25, 1866, ch. 242, § 3, 14 Stat. 240 (California and Oregon Railroad); 1864 U.P. Act § 18, 13 Stat. 364 (Burlington and Missouri River Railroad).

road company.") (emphasis added); *Railroad Co.* v. *Baldwin*, 103 U.S. 426, 430 (1881) ("all persons acquiring any portion of the public lands, after the passage of [1866 right-of-way statute], took the same *subject to* the right of way") (emphasis added). This Court has likewise held that the terms of Section 4 of the 1875 Act show that the railroad will not acquire "any [vested] right as against the United States" until Interior approves the railroad's map, *Stalker* v. *Oregon Short Line R.R.*, 225 U.S. 142, 151 (1912) (emphasis omitted), but that when Interior's approval is given, "the grant vest[s] in the company" and the "grounds so selected [a]re segregated from the public lands" and "withdraw[n] * * * from the market" for future transfer to third parties. *Id.* at 153.

2. Stalker and Steinke confirm that the public lands subject to an 1875 Act right-of-way are conveyed to private parties exclusive of any interest in the right-of-way

This Court's decisions in *Stalker* and *Steinke* concluded that when public lands are conveyed "subject to" an 1875 Act right-of-way, 43 U.S.C. 937, the patent does not convey an interest in the right-of-way lands.

a. In *Stalker*, the plaintiff railroad company claimed a right-of-way for station grounds under the 1875 Act based on its filing of a profile map identifying the location of its railroad and station grounds and Interior's 1888 approval of that map under Section 4. 225 U.S. at 144; see *id.* at 148-149. The register failed to mark the right-of-way on plats in the local land office and, in 1891, the government issued a patent for land, a portion of which overlapped the land granted to the railroad as the right-of-way. *Id.* at 144-145; see *id.* at 148-149. The railroad thereafter brought an

action "to quiet title to four certain lots" that fell within its grant under the 1875 Act, *id.* at 143-144, by "claim[ing] title in fee to the said premises" and asserting that, as "the owner in fee," it was "entitled to the exclusive possession" of the property. Tr. of Record 3, *Stalker*, *supra* (No. 11-225). The trial court held that the railroad was "entitled to a decree quieting its title" and entered a decree declaring that the railroad was "entitled to the exclusive possession" of the land and that the defendant was "perpetually enjoined" from "claiming any right, title, estate or interest in or to any portion of said premises." *Id.* at 7-8. The state supreme court affirmed. 225 U.S. at 143.

This Court affirmed. The Court determined that, when the Secretary approved the railroad's profile map under the 1875 Act, "the grounds so selected were segregated from the public lands" and thereby "withdraw[n] * * * from the market," even though the land was not marked on plats in the local property office. *Stalker*, 225 U.S. at 153. *Stalker* accordingly held that the "subsequent issue of a patent to the land" did not confer title to the portion previously granted to the railroad under the 1875 Act because the 1891 patent, "insofar as it included lands validly acquired theretofore, was in violation of law, and *inoperative to pass title.*" *Id.* at 154 (emphasis added).

b. The Court in *Steinke* later applied *Stalker*'s rationale to conclude that, although the 1875 Act does not provide for "the issu[ance] of a patent" to a railroad, "[t]he approved map is intended to be the equivalent of a patent." *Steinke*, 261 U.S. at 125. In *Steinke*, Interior had approved a railroad's map identifying its grant under the 1875 Act; local officials failed to record that grant in the local land office; a developer

subsequently was issued a patent to land that included the railroad's right-of-way; and he later platted most of that property as a townsite and sold lots in it to the defendants. *Id.* at 121-122. The railroad company filed suit against the defendants, *id.* at 120, 122, seeking a judgment that they "be decreed to have no estate or interest in, or lien or encumbrance upon said property"; that "the defendants be forever debarred and enjoined from further asserting the same"; and that the "[railroad's] title be quieted as to such claims." Tr. of Record 4, *Steinke*, *supra* (No. 21-481). The state courts concluded that defendants had valid title to the land "under a patent from the United States to [the developer]," 261 U.S. at 120, 122, but this Court reversed and directed that judgment be entered for the railroad, *id.* at 133.

This Court rejected the argument that the defendants should prevail because they "purchased from [the developer] in good faith relying on the certificate and patent issued to him." *Steinke*, 261 U.S. at 129. "The approved [railroad] map is intended to be the equivalent of a patent" under the 1875 Act, the Court reasoned, and the "claim on which [the developer] received the certificate and patent" was made only after the disputed "grounds [had] passed to the [railroad] under the approved map." *Id.* at 125, 129. The Court ruled that the failure of "local land officers * * * to note that disposal on the township plat and tract book * * * did not prejudice or affect the [railroad's] title," and that a contrary conclusion was untenable because it would mean that Interior's issuance of "a patent or *its equivalent* * * * could be thwarted or made of no avail by a subsequent omission [by] local land officers." *Id.* at 129-130 (emphasis

added). *Steinke* explained that its holding flowed from the Court's earlier 1875 Act opinion in *Stalker*, which rested on "the * * * ground[]" that the "issue of a patent" to an individual after a railroad company has obtained "approval of its station ground map" does not transfer title to lands specified in the map, because "[t]he patent * * * , insofar as it included lands validly acquired therefore, was in violation of law, and inoperative to pass title." *Id.* at 130-131 (quoting *Stalker*, 225 U.S. at 154).

c. The judgments for the railroad companies that this Court affirmed in *Stalker* and directed in *Steinke* both (1) quieted title in the railroads based on a right-of-way grant under the 1875 Act, and (2) extinguished claims to the same land by holders of otherwise valid land patents subsequently issued by Interior. Whatever the precise scope of the title confirmed in the railroad or claims barred the patentees, those rulings refute petitioners' contention that a railroad's right-of-way under the 1875 Act is in the nature of a bare common-law easement and that the subsequent patentee of a parcel holds title that becomes full and unburdened if the easement is later abandoned.

It follows that petitioners' claim to hold title to the land covered by the 1908 right-of-way in this case as against the United States, based on a patent issued in 1976, is invalid. "[I]nsofar as [the 1976 patent] included lands validly acquired [by the railroad as a right-of-way under the 1875 Act]," the patent was "inoperative to pass title" to such lands. *Steinke*, 261 U.S. at 131 (quoting *Stalker*, 225 U.S. at 154); cf. *Swendig* v. *Washington Water Power Co.*, 265 U.S. 322, 332 (1924)

("The issuing of the patents without a reservation did not convey what the law reserved.").[6]

3. The legislative debate shows that the 1875 Act grants a right-of-way to the railroad subject to a subsequent reverter to the United States

The legislative history confirms that Congress understood and intended that the grant of a right-of-way under the 1875 Act would convey to railroads an interest in land in which the United States would also retain an interest.

When the Chairman of the House Committee on Public Lands reported the general right-of-way bill, he assured the House of Representatives that the bill was unlike prior statutes that had provided land-grant subsidies to railroads, 3 Cong. Rec. 404 (1875)—the checkerboard grants, discussed at pp. 3-5, *supra*, that extended well beyond the right of way itself. Chairman Townsend explained that "[a]ll our grants of public lands" in the bill "have been narrowed down to rights of way." 3 Cong. Rec. at 404. That description of the grant of rights-of-way as a "grant[] of public lands," *ibid.*, paralleled the characterization in the

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[6] Petitioners contend (Br. 37-39) that *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), shows that the government retains only property interests "expressly reserved in [a] patent," and that *Leo Sheep* thus controls this case because petitioners' patent merely states that it is subject to a railroad's "rights for railroad purposes" under the 1875 Act, Pet. App. 78. *Leo Sheep* offers petitioners no support. The concluding paragraph in *Leo Sheep* noted that the easement sought by the government had not been reserved in a land patent, 440 U.S. at 687, but the Court explained that "[t]he pertinent inquiry * * * is the intent of Congress when it granted [the] land" into private ownership. *Id.* at 681. The Court thus interpreted the statutes in dispute and found no intent to preserve a statutory easement. *Id.* at 681-687.

Senate, where the Chairman of the Committee on Railroads explained that the legislation would provide "no grant of lands *except* for stations and depots and the right of way over the public lands." 2 Cong. Rec. 2898 (1874) (statement of Sen. Stewart) (emphasis added).

A colloquy between Chairman Townsend and Representative Hoar later clarified that the legal status of such grants of rights-of-way would be the same as those previously granted by statute to the Union Pacific Railroad. 3 Cong. Rec. at 406. Representative Hoar observed that, under the bill, the land on which the roadbed lies would be "owned by the United States" and that a State would lack authority to "meddle" with "a right of way within its limits granted by the United States." *Ibid.* He further explained that the "United States may in the course of years or generations have *parted with all its public lands* in the State or in the vicinity of the road," but that the railroad would still be able to avoid state regulation because its right-of-way land would remain "the property of the United States," thus requiring the State "to come to Congress" for authority. *Ibid.* (emphasis added). Chairman Townsend then asked, "[i]s not that the condition in which the Union Pacific Railroad stands [elsewhere]?" *Ibid.* Representative Hoar acknowledged, "Undoubtedly." *Ibid.*; cf. *id.* at 2217.

That debate reflects the understanding in Congress that the rights-of-way granted by what would become the 1875 Act were similar to those previously granted to the Union Pacific Railroad—at least to the extent that the United States would always hold a form of ownership interest in the right-of-way, even after the

United States had "parted with all its public lands in the State or in the vicinity of the road."

4. Later statutes implementing the 1875 Act's requirements that confirm that right-of-way lands revert to the United States

Congress made manifest its intent that the United States retain a reversionary interest in 1875 Act rights-of-way in statutes specifically enacted to implement the 1875 Act's provisions governing continuing ownership of rights-of-way granted under the Act. "It is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.'" *Great Northern*, 315 U.S. at 277 (quoting *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 309 (1911)). And that principle carries particular force here, where Congress has exercised its ongoing authority over the 1875 Act's forfeiture conditions by enacting such legislation.

This Court held in *Stalker* that Interior's approval of a railroad company's profile map under Section 4 of the 1875 Act completes the statute's right-of-way grant, such that "the grant vest[s] in the company" and the company obtains a property "right as against the United States" upon such approval. 225 U.S. at 152-153 (citation and emphasis omitted); see also, *e.g.*, *Steinke*, 261 U.S. at 125. But the 1875 Act, like its predecessors, imposes on that grant two conditions subsequent—one express and one implied—which, if breached by the grantee, can result in forfeiture of the right-of-way. See, *e.g.*, *Townsend*, 190 U.S. at 271 ("present grant" is "subject to conditions"). First, Section 4 of the 1875 Act specifies that if a railroad company fails to complete a section of its road within a five-year period, the right-of-way previously granted

"shall be forfeited as to any such uncompleted section." 43 U.S.C. 937. Second, this Court concluded in *Steinke* that the 1875 Act grants a right-of-way "only for the *quasi* public uses named in the act" and accordingly includes an "implied condition that it be devoted to those uses"; if the company breaches that condition (by, *e.g.*, discontinuing its public rail service), it "subjects the grant to a forfeiture by the United States." 261 U.S. at 132.

Under this Court's decision in *Schulenberg* v. *Harriman*, 88 U.S. (21 Wall.) 44, 63 (1875), however, a forfeiture of a federally granted right-of-way triggered by the grantee's failure to meet any such "condition subsequent" may be enforced only by the government (as grantor), either in "a suit by the United States to enforce [the] forfeiture" or by an Act of Congress declaring it. *Bybee*, 139 U.S. at 674-676 (citation omitted); *id.* at 665-666 (forfeiture of railroad right-of-way). Accord, *e.g.*, *Spokane & B.C. Ry.* v. *Washington & Great N. Ry.*, 219 U.S. 166, 169-170, 173-175 (1911) (right-of-way granted by 1898 statute); *United States* v. *Northern Pac. R.R.*, 177 U.S. 435, 440-441 (1900). Congress addressed right-of-way forfeitures under the 1875 Act in 1906 and 1909 by enacting 43 U.S.C. 940, and later in 1922 and 1988 by enacting 43 U.S.C. 912 and 16 U.S.C. 1248(c). Those enactments confirm the United States' reversionary interest in forfeited 1875 Act rights-of-way.

a. First, in 1906, Congress enacted a statute now codified at 43 U.S.C. 940 to declare the forfeiture of all rights-of-way granted under the 1875 Act with respect to which a grantee company had not (by 1906) timely constructed its railroad. Act of June 26, 1906, ch. 3550, 34 Stat. 482; see S. Rep. No. 2732, 59th Cong.,

1st Sess. 1 (1906) (explaining that 1875 Act's forfeiture requirement "is not self-executing" and that "[e]ither a Congressional or judicial forfeiture must be declared"). Congress renewed that "affirmative declaration of forfeiture" in 1909 for forfeitures occurring up to that date, S. Rep. No. 961, 60th Cong., 2d Sess. 1-2 (1909). See Act of Feb. 25, 1909, ch. 191, 35 Stat. 647. As relevant here, Section 940 provides that "[e]ach and every grant of right of way and station grounds * * * under sections 934 to 939 [the 1875 Act]" for which the relevant five-year period "had on [February 25, 1909] expired" is "declared forfeited to the United States * * * and the *United States resumes the full title to the lands* covered thereby free and discharged from such easement." 43 U.S.C. 940 (emphasis added). Section 940 then provides that "the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land" that the United States had previously conveyed to such owner or owners "subject to any such grant of right of way." *Ibid.*

Those provisions make clear that, upon the forfeiture of an 1875 Act right-of-way, it is the *United States* that acquires "full title" to the land thereunder. Section 940, moreover, specifically provides that the United States resumes "full title" *even if* the United States previously conveyed into private ownership (when the right-of-way was still held by the railroad) a parcel that contained the right-of-way within its borders. Section 940 thereby confirms that the United States' conveyance of a parcel of public lands "subject to" an 1875 Act right-of-way, 43 U.S.C. 937, conveys only that portion of land within the parcel not encompassed by the right-of-way. See pp. 28-31, *supra*.

Otherwise, the subsequent grantee of the surrounding parcel would have held an interest in the "lands covered []by [the right-of-way]" and the United States would not, as Section 940 requires, "resume[] the full title to th[ose] lands" upon forfeiture, 43 U.S.C. 940.

Petitioners suggest (Br. 46 n.17) that Congress's decision to allow the forfeiture declared by Section 940 to "inure to the benefit" of the private owner of the surrounding land undermines the conclusion that the United States resumes full title. That is incorrect. The provision on which petitioners rely merely reflects Congress's decision that once the right-of-way is forfeited, the benefit of it should in turn be transferred. That very transfer is premised on the government's retention of a reversionary interest providing "full title" to the land.

Petitioners likewise note (Br. 46) that this Court in *Great Northern* concluded that an 1875 Act right-of-way is an "easement" in part because Section 940's text characterizes it as an "easement." See 315 U.S. at 276; 43 U.S.C. 940 (forfeiture of right-of-way frees the United States' title "from such easement"). But petitioners' observation shows that *Great Northern* employed the term "easement" in a manner different than petitioners do.

In petitioners' view, 1875 Act rights-of-way are bare "*common*[-]*law* easements." Br. 31-32 (emphasis added). At common law, petitioners explain, (1) when G owns a fee-simple title in land that is burdened by an easement, (2) G then conveys that title to P, and (3) the easement is later abandoned, the abandonment simply unburdens the land such that P obtains full title and G enjoys *no* reversionary property interest. Br. 32-34. But that cannot be the type of "ease-

ment" described in Section 940. Under that section, it is the *government* (G) that "resumes the full title" to the lands covered by the forfeited right-of-way, free from such "easement." Congress's use of the term "easement" in this particular 1875 Act context thus must mean something different than a mere common-law easement: The term must refer to a type of interest in land in which the government retains a full reversionary interest.

b. The Act of March 8, 1922, ch. 94, 42 Stat. 414 (43 U.S.C. 912), likewise shows that Congress intended the United States to retain, and therefore control disposition of, a full-title reversionary interest in the right-of-way. Section 912 applies "[w]henever" a court or Act of Congress declares the forfeiture or abandonment of a right-of-way originally "granted to any railroad company" using "public lands of the United States," 43 U.S.C. 912, including those granted under the 1875 Act. See H.R. Rep. No. 217, 67th Cong., 1st Sess. 1 (1921) (*1921 House Report*) ("most" of the rights-of-way affected by Section 912 were granted under "[t]he act of March 3, 1875").

In enacting the 1922 Act, Congress concluded that the United States' title to forfeited right-of-way lands (including lands forfeited by abandonment) should be dealt with in different ways, depending on the circumstances. Congress determined that there is a "public interest" in establishing roads, granting municipalities such lands "within the[ir] limits," *1921 House Report* 2, and retaining the government's potentially "very valuable" interest in "oil, gas, and mineral rights" in the lands covered by the right-of-way, 61 Cong. Rec.

4496 (1921).[7] Congress therefore provided that the United States would transfer or reserve its title as necessary to further those public purposes. Congress otherwise concluded (at that time) that it "seemed" that other forfeited rights-of-way lands would have "little or no value" and should be transferred to those who acquired parcels containing them. *1921 House Report* 2. To implement this plan, Section 912 directs that when a railroad company has ceased "use and occupancy" of right-of-way lands by a forfeiture or abandonment that has been "declared or decreed by a court of competent jurisdiction or by Act of Congress," then, upon such decree or Act, "all right, title, interest, and estate of the United States in said lands shall * * * be transferred to and vested in any person" owning the legal subdivision occupied by the right-of-way lands, unless a public highway is established within a year on the land or the land is within a municipality. 43 U.S.C. 912.

By providing for the post-abandonment conveyance of rights-of-way crossing private lands to municipalities and for public highways, and by otherwise affirmatively "transfer[ring]" them to owners of the under-

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[7] The Act of May 21, 1930, ch. 307, 46 Stat. 373-374, authorized Interior to lease deposits of oil and gas owned by the United States that were located beneath federally granted rights-of-way. In 1976, the Interior Board of Land Appeals concluded that a patent to a land parcel crossed by a right-of-way granted under the 1875 Act confers the subsurface mineral rights under the right-of-way, where the mineral rights were not expressly reserved in the patent. *Amerada Hess Corp.*, 24 I.B.L.A. 360 (1976). The question of subsurface mineral rights is not at issue in this case and the Board's conclusion thus does not affect the disposition of this case. Cf. Pet. App. 76 (patent issued pursuant to 16 U.S.C. 485); 16 U.S.C. 485 (authorizing transfer of nonmineral lands).

lying land, Section 912 again demonstrates Congress's understanding that the United States retains substantial interests in those rights-of-way. Petitioners discount (Br. 40-49) this conclusion for several reasons, none of which is persuasive.

Petitioners argue (Br. 42) that Congress could not have foreseen the need for Section 912's distribution rules in 1875. But *Schulenberg*—which holds that a judicial or legislative act is required to declare a federal grant forfeited for failing to meet a condition subsequent—was decided on January 25, 1875, before Congress enacted the 1875 Act in March. Congress thus reasonably could have anticipated that the United States would have to make decisions about what to do with forfeited lands, which were contemplated by Section 4 of the 1875 Act, 43 U.S.C. 937, in situations in which the rail line was never built.

Moreover, petitioners' argument fails to recognize that no provision of the 1875 Act expressly addresses forfeiture of any section of right-of-way for which a company has already built, but then abandoned, its rail line. Instead, this Court has recognized that such lands may be forfeited because of an "*implied* condition that [the right-of-way] be devoted to [statutory] uses," which, when breached, "subjects the grant to a forfeiture *by the United States*." *Steinke*, 261 U.S. at 132 (emphases added). The Court has thus held that private individuals cannot themselves enforce such a forfeiture, nor can they obtain "any interest in the tract" or "a right to use it for private purposes, without the sanction of the United States." *Id.* at 132-133. Section 912 simply provided (until 1988) the authorization of the United States to convey forfeited right-of-

way land to private owners if not within a municipality or needed for a highway.

Petitioners argue (Br. 42-45) that Section 912 should be disregarded because it was enacted in light of this Court's recognition in *Rio Grande Western Railway* v. *Stringham*, 239 U.S. 44, 47 (1915), that an 1875 Act right-of-way is "a limited fee, made on an implied condition of reverter," but that *Great Northern* subsequently concluded that such a right-of-way is in the nature of an "easement." Petitioners' response, however, does not address the fact that in 1906 and 1909—well before *Stringham*—Congress concluded that the United States retains a "full title" reversionary interest upon the forfeiture of an 1875 Act right-of-way. See 43 U.S.C. 940. Section 940 provided for one method of disposing of the United States' interest in the land to which it had "full title" after a forfeiture has been declared by specifying that the forfeiture shall inure to the benefit of the patentee of the parcel containing it. Section 912 simply redefined on an ongoing basis how the United States would dispose of or retain such an interest. Moreover, as explained below, *Great Northern* involved a railroad's right to minerals as against the United States while a right-of-way was still in effect. It addressed neither the extent of the United States' reversionary interest in a right-of-way upon forfeiture nor the resulting rights of the United States as against the patentee with respect to the right-of-way. See pp. 45-53, *infra*.

c. Finally, in 1988, Congress once again altered its policy governing disposition of the United States' interests previously governed by Section 912. Congress specified that, "[c]ommencing October 4, 1988," "all rights-of-way of the type described in section 912

* * * shall remain in the United States upon the[ir] abandonment or forfeiture," except for lands on which highways are established within one year. 16 U.S.C. 1248(c). Section 1248(c) thus demonstrates that Congress has continued to recognize the United States' reversionary interest in, and its right to control the disposition of, 1875 Act rights-of-way.[8]

d. Despite Congress's repeated enactments confirming the United States' reversionary interest in 1875 Act rights-of-way, petitioners contend (Br. 28-30) that their "easement" theory is supported by Interior regulations stating that private owners of a parcel surrounding an 1875 Act right-of-way take the large parcel subject only to the railroad's right of "*use and possession.*" Br. 28-29 (citing 43 C.F.R. 2841.1(a) (1976)) (emphasis added by petitioner). But those regulations do not define the scope of the United States' underlying interest in the right-of-way or reject a federal reversionary interest. Indeed, a 1904 regulation not cited by petitioners states that the aforementioned right of use and possession includes "a reversionary interest remaining in the United States" that, according to the regulation, was to be "conveyed" by the United States to the larger parcel's patent holder. *Regulations Concerning Railroad Right of Way over the Public Lands*, 32 Pub. Lands Dec. 481, 482-483 (1904). That regulation affirmative-

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[8] Additional statutes reflect Congress's conclusion that it may authorize transfers of rights-of-way. See 23 U.S.C. 316 (enacted 1958) (authorizing "any" railroad to convey "any part of its right-of-way" acquired by federal grant to state transportation department); 43 U.S.C. 913 (enacted 1920) (authorizing "[a]ll railroad companies" granted rights-of-way through public lands to convey portions of rights-of-way for use as "public highway or street").

ly recognizes the government's ongoing interest and appears to anticipate (somewhat like the later-enacted Section 940) ensuring transfer of that interest to private parties.

Since 1912, *Stalker* (as reinforced by *Steinke* in 1923) has made clear that a patent for a parcel surrounding an 1875 right-of-way conveys no title to the right-of-way. Interior's decisions have not been entirely clear as the agency attempted to apply the "easement" and limited "fee" terminology used by the courts. But statutes enacted from 1906, through 1922, to 1988 have made clear that the United States retains a reversionary interest and resumes full title upon the forfeiture or abandonment of a right-of-way.

e. Petitioners suggest (Br. 23, 34) that *Smith* v. *Townsend*, 148 U.S. 490 (1893), supports their view that the government lacks a reversionary interest in 1875 Act rights-of-way. That is incorrect. *Smith* involved a different statute and addressed competing claims by two homesteaders to a parcel in Oklahoma either near or traversed by a railroad right-of-way through Indian lands. *Id.* at 491-492, 498, 502. That right-of-way was granted under an 1884 Act that specified that, if the railroad ceased using the right-of-way for operating its railroad and its telegraph and telephone lines, the right-of-way would revert directly to the Tribe from which it was taken. *Id.* at 498. An 1889 statute, however, converted all "lands acquired by the United States" by treaty with the Tribe into "the public domain" and further directed that those lands then be "disposed of" under homestead acts. *Id.* at 493 (citation omitted). The Court noted (in dictum) that, if the railroad were to abandon its "use of that right of way," "the full title to that right of way would

vest in the patentee of the land." *Id.* at 499. That passing observation appears to have been based at least in part on the fact that the Tribe had a direct reversionary interest and, when it obtained the land, the United States by statute elected to dispose of such lands to homesteaders. Moreover, the 1884 right-of-way statute, which the Court characterized as granting an easement, not only provided for the right-of-way's reversion to the Tribe, it also contained provisions that strictly regulated non-Indian conduct within the right-of-way and prohibited the railroad from advising or assisting any effort to "change the present tenure of the Indians in their lands" or to secure such lands or occupancy therein; and ultimately provided for the right-of-way to revert to the Tribe. *Id.* at 498. Those distinctive provisions bear no resemblance to the 1875 Act.

f. Owners of parcels crossed by 1875 Act rights-of-way could have no settled and reasonable expectation to obtain the right-of-way land upon its forfeiture or abandonment by a railroad. The rights-of-way are marked on plats at local land offices, 43 U.S.C. 937; most rail lines have been physically present for many decades (in this case about one century); the Court's decisions in *Stalker* and *Steinke* show that no interest in the right-of-way is passed by patent; and Congress has repeatedly enacted statutes identifying the United States' reversionary interest in those rights-of-way. Any such subjectively held belief would be unreasonable. See *Steinke*, 261 U.S. at 131-132; cf. *United States* v. *California*, 332 U.S. 19, 39-40 (1947) (The government "holds its [land] interests here as elsewhere in trust for all the people" and those interests

cannot be divested under "principles similar to laches, estoppel or adverse possession.").

B. *Great Northern* Did Not Address The Question Of Reverter To The United States And Does Not Control This Case

Petitioners primarily rely (Br. 18-28) on this Court's 1942 decision in *Great Northern* to support their ultimate contention (Br. 31-33) that 1875 Act rights-of-way are "[no]thing but common law easements," which, at common law, would terminate when abandoned and leave a full fee interest in the holder of the land patent for the parcel containing the right-of-way. We acknowledge that there is language in the *Great Northern* opinion and the government brief in that case that lends support to petitioners' position. But *Great Northern* did not address a question concerning the reversionary interests of the United States, and it does not resolve this case.

Great Northern addressed the distinct question, in the context of a suit brought by the United States against a railroad, "whether [the railroad] has any right to the oil and minerals underlying its right of way acquired under the [1875 Act]." 315 U.S. at 270. The Court was not presented with any question about property rights of any third parties to whom the government subsequently conveyed the tracts crossed by the right-of-way, and the government informed the Court that that "additional question" would implicate different considerations. Gov't Br. 10 n.4, *Great Northern*, *supra* (No. 41-149) (*GN* Br.).[9] When viewed

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[9] Indeed, because of pleading issues, the Court at the close of its opinion limited its judgment to situations where the government

in context, *Great Northern* held only that the 1875 Act confers on a railroad "no right to the underlying oil and minerals" because, with respect to such subsurface rights, and as against the United States, its "right of way is but an easement." 315 U.S. at 279.

It has long been understood that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)), and not as "referring to quite different circumstances that the Court was not then considering," *Illinois* v. *Lidster*, 540 U.S. 419, 424 (2004). Accord, *e.g.*, *Bramwell* v. *United States Fid. & Guar. Co.*, 269 U.S. 483, 489 (1926). That principle has particular force here, because the text Congress enacted in 1875 employs only the term "right of way," not "easement." Cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341-342 (1979) (the language of an opinion is not to be "parsed as though we were dealing with language of a statute"). The Court's holding in *Great Northern* does not foreclose the conclusion that the right-of-way, even if labeled as an "easement," can in other respects carry characteristics of a limited fee and can in any event include an implicit condition of reverter to the United States if the right-of-way is abandoned.

1. The government's arguments in *Great Northern* do not suggest such issues were before the Court. The government argued that the 1875 Act's text, its historical context, Congress's subsequent enactment of 43 U.S.C. 940 in 1906 and 1909, and Interior's per-

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had "retained title to [the relevant] tracts of land" crossed by the right-of-way. *Great Northern*, 315 U.S. at 279-280.

tinent decisions showed that the Act's grant of a right-of-way "is in the nature of an easement" that does not convey subsurface minerals to the railroad. *GN* Br. 8, 29 (emphasis added; capitalization omitted); see *id.* at 8-34. It explained that the Court's decision in *Stringham* was not controlling and that other decisions describing such rights as "limited fees" did not address the railroad's ownership of mineral rights. *Id.* at 31-34. The government additionally argued that, even if an 1875 Act right-of-way were viewed as a "limited fee," it would not convey such minerals to the railroad. *Id.* at 35-37.

In arguing that the 1875 Act's right-of-way grant was in the nature of an "easement," the government did not attempt to discuss comprehensively what that label would mean in contexts not involving claims to mineral rights as between the railroad and the United States—such as with respect to reversionary interests of the United States or the respective interests of the United States and the patentees of land through which the right-of-way passes if the right-of-way was later abandoned by the railroad. It acknowledged, for instance, the "fact" that the Act's right-of-way had "some of the attributes of a fee"—including "'perpetuity and exclusive use and possession,'" and "'the remedies of the fee'" and "'corporeal'" property—but explained that those traits were consistent with describing the railroad's right-of-way as an "easement." *GN* Br. 36-37 (quoting *United States Trust Co.*, 172 U.S. at 183). The government likewise stated that "[a] fee may * * * exist in an easement" granted "on an implied condition of reverter." *Id.* at 36 (emphasis and citations omitted). And the government explained that it was "well settled that an

easement may be held in fee determinable," *ibid.* (citing, *e.g.*, *Easements* § 16, at 14; *Hall* v. *Turner*, 14 S.E. 791, 795 (N.C. 1892)), which can take the form of a defeasible fee subject to a "condition subsequent" that, if triggered, gives the entity that conveyed the fee the power to terminate it and reacquire its original fee interest by reverter. See 1 *Restatement* §§ 16, 24 & cmts. b, d and g, at 43, 59-61, 63 (1936); 2 *Restatement* §§ 154 & cmt. a, 155 & cmt. c, at 525-526, 532-534 (1936); see *Carver* v. *Jackson*, 29 U.S. (4 Pet.) 1, 90 (1830) (Story, J.) (An "estate in fee might be defeasible, and determinable upon a subsequent contingency."); *Easements* § 16, at 14 ("An easement may be held in fee."). The government likewise explained that the case did not raise the "additional question" whether persons who have subsequently acquired "legal subdivisions crossed by railroad rights of way" would "succeed[] to the mineral rights of the Government," explaining that the Court's resolution of that issue would need to be based on additional analysis. *GN* Br. 10 n.4.

2. The Court in *Great Northern* largely adopted the government's arguments in holding that the 1875 Act granted the railroad company an "easement" and thus provided it "no right to the underlying oil and minerals." 315 U.S. at 279. Although the Court did not discuss how its decision should apply outside the context of mineral rights as between the railroad and the United States, *Great Northern* is fairly read as resolving that issue without determining whether the Act's rights-of-way must be interpreted as having only the effects of a bare common-law easement in every respect.

a. The Court in *Great Northern*, for instance, was heavily influenced by a significant "change in Congressional policy" that by 1872 ended generous land grants to subsidize railroads. 315 U.S. at 273-275. That change was important to the question whether Congress intended in 1875 to provide another subsidy—"mineral riches" (*id.* at 275)—to railroads by granting them subsurface mineral rights. On that question, the Court had little reason to conclude that Congress intended a new form of subsidy. The Court, for example, quoted an 1872 legislative colloquy indicating that an earlier right-of-way bill analogous to the 1875 Act "grant[ed] no land to any railroad," *id.* at 271 n.3 (citation omitted), which reflected that that bill (unlike its previously debated direct predecessor) no longer contained a checkerboard land subsidy and merely granted land for rights-of-way. See *Roberts* 154-157 (discussing legislative history). The Court likewise explained that the 1875 Act's purpose did not warrant interpreting its right-of-way grant to the railroad as "conveying a fee title to the land and the underlying minerals." 315 U.S. at 272.

The nature of a *surface* interest in the right-of-way land needed to operate a railroad serving the public, however, is quite different. Such grants—defined in physical terms, existing in perpetuity, and exclusive—were necessary to accomplish the vital public purpose of developing a meaningful rail transportation system in the undeveloped "Western vastnesses," because public lands were immune from eminent domain and adverse possession. *Great Northern*, 315 U.S. at 274. Moreover, the right-of-way grant is forfeited under the 1875 Act, as under predecessor acts, if the railroad ceases to use it for the functions specified by Con-

gress. See pp. 23-24, 34-35, *supra*. The grant thus is contingent on the railroad's *ongoing* provision of public benefits.

b. *Great Northern* also stated that the 1875 Act "clearly grants only an easement, and not a fee" that could confer mineral rights. 315 U.S. at 271. The Court's statutory analysis in this regard is not entirely clear. The Court stated that the article "the" in "the right of way" suggests merely a right of passage, *ibid.*, but that precise phrase appeared in numerous pre-1872 right-of-way provisions deemed to bear hallmarks of limited fees. See pp. 18-19, *supra*. The Court noted that Section 2 forbids a railroad from preventing any other railroad company from the "*use and occupancy*" of a canyon, pass, or defile for its railroad "*in common*" with the first railroad located, 315 U.S. at 271, but that provision simply imposes a statutory condition that the railroad granted the right-of-way must allow shared use and occupancy by other railroads; it does not speak to the nature of the property interest of the railroad or the United States in the right-of-way. The Court concluded that Section 4 was "wholly inconsistent with the grant of a fee" and reflected "intent to convey an easement" because it directed that public lands "*over*" which the right-of-way passes shall be disposed "*subject to*" the right-of-way, *ibid.*, but this Court previously used such terms differently in connection with earlier right-of-way acts. See pp. 26-28, *supra*. In any event, the Court did not address any reversionary interests of the United States or its rights in rights-of-way as against third parties.

Indeed, *Great Northern*'s reliance on Section 940's description of an 1875 Act right-of-way as an "ease-

ment" to support its holding, 315 U.S. at 276, demonstrates that the Court could not have used the term "easement" to mean that such rights-of-way must be treated as common-law easements in all respects—and in particular, to deny a right of reverter in the United States. As discussed, Section 940 in fact confirms that, when the government has conveyed title to the surrounding parcel into private hands, it is the *government* that obtains "full title" to the land embraced by the right-of-way, free of the "easement" granted to the railroad, upon forfeiture by the railroad. See pp. 35-38, *supra*.[10]

Had the Court intended to address the question of a reverter to the United States upon a railroad's forfeiture or abandonment of its right-of-way, the Court presumably would have discussed the 1922 Act, which vests "all right, title, interest, and estate" in forfeited or abandoned 1875 Act rights-of-way in the United States. 43 U.S.C. 912. *Great Northern* simply had no

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[10] The Court's subsequent decision in *Union Pacific* reflects the Court's recognition that labels such as "easement" and "limited fee" used in prior decisions to describe the statutory term "right of way" should not drive the outcome in all contexts. The Court there declined to conclude that a railroad right-of-way granted under a pre-1872 right-of-way statute necessarily conveyed mineral rights simply because prior decisions had described the-right-of-way as a "limited fee." 353 U.S. at 118-119. Instead, the Court construed the relevant statute and its prior decisions to hold that the right-of-way provided no mineral rights. *Id.* at 114-117, 120. Application of that interpretative approach, which examines the relevant right-of-way context and is not strictly tied to prior characterizations of the statutory term "right of way," confirms that the United States retains a reversionary interest in the right-of-way forfeited by the railroad in this case.

occasion to do so. Nor did the United States discuss the 1922 Act in its brief.

c. That understanding of *Great Northern* is reinforced by the fact that *Great Northern* cited both *Stalker* and *Steinke* favorably. 315 U.S. at 272 & n.4. The Court apparently perceived no inconsistency between (1) its conclusion that, as against the United States, an 1875 Act right-of-way should be viewed as granting the railroad company an "easement" that did not convey "underlying oil and minerals" to the railroad, *id.* at 279, and (2) the holdings in *Stalker* and *Steinke*, which establish that Interior's approval of a railroad's profile map "withdraw[s] the land so granted from the market," *Stalker*, 225 U.S. at 153, and is "the equivalent of a patent" that makes any subsequently issued patent for the larger parcel "'inoperative to pass title'" to the right-of-way to third parties, *Steinke*, 261 U.S. at 125, 131 (quoting *Stalker*, 225 U.S. at 154). See pp. 28-31, *supra*.

Petitioners erroneously assert (Br. 52) that *Great Northern* "effectively overruled" this Court's 1875 Act decision in *Stalker sub silentio*. *Great Northern* concluded that (1) the Court's prior decisions concerning pre-1872 right-of-way statutes did not "involve[] the problem of rights to subsurface oil and minerals" and were "not controlling" in the mineral-rights dispute before it, and (2) language in *Stringham* describing an 1875 Act right-of-way as a "limited fee" (which was not necessary to its holding) was likewise "not regard[ed] * * * as controlling." 315 U.S. at 278-279 (explaining that *Stringham* affirmed a state-court judgment that had awarded the plaintiff railroad a "right of way" because that judgment "describe[d] the right of way in the exact terms of the right-of-way act,

and evidently uses those terms with the same meaning they have in the act"). Neither conclusion is inconsistent with *Stalker*.

Moreover, it is well settled that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)); see, *e.g.*, *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012). That principle has particular force here. After *Stalker* (1912), this Court applied *Stalker*'s holding in *Steinke* in 1923, see pp. 29-31, *supra*, and Congress has enacted multiple statutes confirming that the United States retains its reversionary interest in abandoned 1875 Act rights-of-way, see pp. 35-42, *supra*. Altering this Court's interpretation of the legal effect of Interior's Section 4 approvals in *Stalker* and *Steinke* nearly a hundred years after those decisions—and in derogation of a number of statutes, enacted before and after those decisions, that confirm the United States' reversionary interests—"would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2641 (2011) (quoting *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 16 U.S.C. 1248(c) provides:

Easements and rights-of-way

(c) Abandoned railroad grants; retention of rights

Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

2. 43 U.S.C. 912 provides:

Disposition of abandoned or forfeited railroad grants

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year

after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

3. 43 U.S.C. 913 provides:

Conveyance by land grant railroads of portions of rights of way to State, county, or municipality

All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street: *Provided*, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on each side of the center of the main track of the railroad as now established and maintained.

4. 43 U.S.C. 934 (Section 1 of the 1875 Act) provides:

Right of way through public lands granted to railroads

The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each

station, to the extent of one station for each ten miles of its road.

5. 43 U.S.C. 935 (Section 2 of the 1875 Act) provides:

Several roads through canyons

Any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, on the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway located therein on March 3, 1875, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructted at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

6. 43 U.S.C. 936 (Section 3 of the 1875 Act) provides:

Condemnation of private land

The legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 1, 1862,'" approved July 2, 1864 [43 U.S.C. 942-3].

7. 43 U.S.C. 937 (Section 4 of the 1875 Act) provides:

Filing profile of road; forfeiture of rights

Any railroad company desiring to secure the benefits of sections 934 to 939 of this title, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall

not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

8. 43 U.S.C. 938 (Section 5 of the 1875 Act) provides:

Lands excepted

Sections 934 to 939 of this title shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by Act of Congress passed prior to March 3, 1875.

9. 43 U.S.C. 939 (Section 6 of the 1875 Act) provides:

Alteration, amendment, or repeal

Congress reserves the right at any time to alter, amend, or repeal sections 934 to 939 of this title, or any part thereof.

10. 43 U.S.C. 940 provides:

Forfeiture of rights where railroad not constructed in five years after location

Each and every grant of right of way and station grounds made prior to February 25, 1909, to any railroad corporation under sections 934 to 939 of this title, where such railroad had not been constructed and the period of five years next following the location of said road, or any section thereof, had on that date expired,

is declared forfeited to the United States, to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right of way or station grounds: *Provided*, That no right of way on which construction was progressing in good faith on February 25, 1909, shall be in any wise affected, validated, or invalidated, by the provisions of this section.

11. Act of July 1, 1862, ch. 120, 12 Stat. 489, as amended by the Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358 (with text added and ~~deleted~~ by amendment indicated), provides in pertinent part:

* * * * *

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to [The Union Pacific Railroad Company] for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings,

workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of ~~five~~ ten alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ~~ten~~ twenty miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

* * * * *

12. Act of July, 2, 1864, ch. 216, 13 Stat. 356, provides in pertinent part:

* * * * *

SEC. 3. *And be it further enacted*, That the Union Pacific Railroad Company, and all other companies provided for in this act and the act to which this is an amendment, be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station house[s], or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its road-bed, though standing or being more than one hundred feet therefrom. And in case the owner or claimant of such lands or premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by any party to any judge of a court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court of such appraisement, and upon the payment to the clerk thereof of the amount so

awarded by the commissioners for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties, for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost incurred by the appellee, as well as its own. And the payment into court for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining, and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the territory, or subject to any legal disability, the court may appoint a proper person who shall give bonds with sufficient surety or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceeding shall be had in reference to the appraisement of the premises to be taken, and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of any failure by any guardian to discharge

faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of, and acquiring a title to, the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant, or any other person under guardianship, to agree with the proper company as to damages sustained by reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the said company which shall vest the title thereto in the said company.

* * * * *

SEC. 18. *And be it further enacted*, That the Burlington and Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the State of Iowa, be, and hereby is, authorized to extend i[t]s road through the Territory of Nebraska from the point where it strikes the Missouri River,

south of the mouth of the Platte River, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practicable route, with the main trunk of the Union Pacific Railroad, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude. And, for the purpose of enableing [per original] said Burlington and Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hnndred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water-stations. And the United States shall extinguish, as rapidly as may be, consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

* * * * *

13. Act of July 2, 1864, ch. 217, 13 Stat. 365, provides in pertinent part:

* * * * *

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of

public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a

like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

* * * * *

14. Act of Mar. 3, 1871, ch. 122, 16 Stat. 573, provides in pertinent part:

* * * * *

SEC. 8. That the right of way through the public lands be, and the same is hereby, granted to the [Texas Pacific Railroad Company] for the construction of the said railroad and telegraph line, and the right, power, and authority is hereby given to said company to take, from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands; and there is also hereby granted to said company grounds for stations, buildings, workshops, wharves, switches, side-tracks, turn-tables, water-stations, and such other structures as may be necessary for said railroad, not exceeding forty acres of land at any one point.

SEC. 9. That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have *not have* been sold, reserved, or otherwise disposed of by the United States, and to which a pre- emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word "mineral," where it occurs in this act, shall not be held to include iron or coal: *Provided, however,* That no public lands are hereby granted within the

State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term "ship's channel," as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego bay than it may acquire by gift, grant, purchase, or otherwise, except the right of way, as herein granted: *And provided further*, That all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre- emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted.

* * * * *

REPLY BRIEF

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In The
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST
AND MARVIN M. BRANDT, TRUSTEE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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INTRODUCTION

In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), the government sought to distinguish the right-of-way grant made by the 1875 Act, 43 U.S.C. §§ 934-939, from those rights-of-way granted by the earlier railroad land grant acts, which are limited fees with an implied condition of reverter. *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) ("*Townsend*"). By emphasizing the language of the 1875 Act, Congress's shift in policy in 1871, and the Department of the Interior's interpretation of the Act, the government argued that 1875 Act rights-of-way are easements. Brief for the United States, *Great Northern Ry. Co. v. United States*, No. 149, at 8-35 (1942) ("U.S. *GN* Br."). This Court agreed. *Great Northern*, 315 U.S. at 270-79.

The government now asks for a mulligan because interpreting the 1875 Act as granting easements subjects the government to takings claims as abandoned 1875 Act rights-of-way are converted into recreational trails. By relying on many of the same arguments the railroad unsuccessfully made in *Great Northern*, the government implores this Court to redefine 1875 Act rights-of-way as limited fees in the surface with an implied reversionary interest in favor of the government. The government's new argument has no basis in law and would upset the title of thousands of landowners.

ARGUMENT

I. THE 1875 ACT AND PRE-1871 RAILROAD LAND GRANT ACTS ARE MATERIALLY DIFFERENT.

In *Great Northern*, a railroad sought to exploit the mineral wealth lying beneath an 1875 Act right-of-way that crossed public lands. 315 U.S. at 270-71, 279-80. To prevail, the government had to distinguish the 1875 Act from the pre-1871 railroad land grant acts.[1] The government focused on Section 4 of the 1875 Act, which provides that "[a]ny railroad company desiring to secure the benefits of [the 1875 Act]" shall file with the local land office "a profile of its road" and "upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. . . ." 43 U.S.C. § 937. Relying on well-known distinctions between easements and fees, the government argued that Section 4 showed that Congress intended to grant only a common-law easement when it passed the 1875 Act. U.S. *GN* Br. at 11-12. This Court agreed. *Great Northern*, 315 U.S. at 271 ("This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee.").

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[1] The last railroad land grant act was passed in 1871. Act of March 3, 1871, 16 Stat. 573-79 (1871). For convenience, all railroad land grant acts are referred to as "pre-1871."

Because interpreting the 1875 Act as granting common-law easements does not serve its present-day needs, the government now seeks to upset the title of thousands of landowners by asking this Court to redefine 1875 Act rights-of-way as a property interest heretofore never recognized. Specifically, the government is asking this Court to characterize 1875 Act rights-of-way as an interest that morphs into either an "easement" or a "fee" depending on the "context." Brief for the United States at 16 ("U.S. Br."). In other words, the government is seeking *carte blanche* to determine the nature of 1875 Act rights-of-way as it sees fit.

The government's argument is untenable. The law of property in this country is based upon certainty and predictability of title. *See* Amicus Curiae Brief of Cato Institute, *et al.*, at 5-11 ("Cato Br."). In a similar case in which the government sought to redefine previously granted property interests to suit its current needs, this Court flatly rejected the government's argument:

> This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.

Leo Sheep Co. v. United States, 440 U.S. 668, 687-88 (1979).

Leo Sheep controls the question presented. Over seventy years have passed since *Great Northern*, and thousands of landowners now hold title to land originally patented by the United States in fee "subject to" an easement created by the 1875 Act. "To [now] say to these [landowners], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).[2]

The government tries to justify the abrogation of title by suggesting that this Court really did not mean what it said in *Great Northern* when it ruled that 1875 Act rights-of-way are easements. U.S. Br. at 45-52. It strains credulity to think this Court did not recognize the significance of the common-law term "easement" when it repeatedly used that term in

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[2] The agency charged with administering the 1875 Act – the Department of the Interior – has consistently interpreted the Act as granting an easement. *Great Northern*, 315 U.S. at 275-76; *see* 43 C.F.R. § 2842.1(a) (1976); Brief of Petitioners at 28-30, 50-51; Amicus Curiae Brief of Pacific Legal Foundation at 9-11; Amicus Curiae Brief of National Association of Reversionary Property Owners at 5-16 ("NARPO Br."). Because of the government's longstanding recognition that 1875 Act rights-of-way are easements and the property interests created in reliance thereto, any implied suggestion to overrule *Great Northern* should be rejected. Indeed, "[t]his Court has expressed its reluctance to overrule decisions involving statutory interpretation, and has acknowledged that *stare decisis* concerns are at their acme in cases involving property . . . rights[.]" *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal citations omitted). Both concerns are present in this case.

describing 1875 Act rights-of-way. *Great Northern*, 315 U.S. at 271 ("The [1875 Act], from which [the railroad's] rights stem, clearly grants only an easement, and not a fee."); *id.* at 272 (The purpose of the 1875 Act can be achieved if the right-of-way is an easement, rather than a fee, because "a railroad may be operated though its right of way be but an easement."). This Court's clear distinction between an easement and a fee indicates that the Court did not use the term "easement" carelessly.[3]

To be sure, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821). Yet, this Court's

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[3] In rejecting the railroad's "limited fee" argument, *Great Northern* found "persuasive" two earlier cases that had interpreted post-1871 railroad right-of-way grants as conveying only an easement. 315 U.S. at 279 (citing *Denver & R.G. Railway Co. v. Alling*, 99 U.S. 463, 475, 478 (1878) (Act of June 8, 1872, 17 Stat. 339 (1872), granted "a present beneficial easement") and *Smith v. Townsend*, 148 U.S. 490, 498 (1893) (Act of July 4, 1884, 23 Stat. 74 (1884) granted "simply an easement, not a fee in the land")). The government ignores *Alling* and tries to distinguish *Smith* because the statute in that case contained an expressed reversionary interest. U.S. Br. at 43-44. *Smith* demonstrates that Congress – if it so desired – could have expressly reserved the reversionary interest that the government now asks this Court to find through implication. Because Congress did not expressly reserve a reversionary interest in 1875 Act rights-of-way when the lands traversed thereby are patented, proves none was intended. *See Leo Sheep*, 440 U.S. at 678-80.

ruling in *Great Northern* that 1875 Act rights-of-way are easements was not a "general expression"; it was the foundational ruling for this Court's holding that the railroad did not own the minerals underlying the 1875 Act right-of-way. 315 U.S. at 279 ("Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals."). In fact, the government specifically initiated the suit in *Great Northern* to "obtain a determination of the *nature* . . . of the grant made by the [1875 Act]." U.S. *GN* Br. at 8-9 (emphasis added). As acknowledged by the government, the answer could be one of three common-law property interests: "an absolute fee, a limited fee, or simply a surface easement." *Id.* at 9. That the government now regrets this Court's ruling that 1875 Act rights-of-way are the lesser of the three property interests does not compel a constrained application of the ruling in *Great Northern*.

This is especially true considering *Great Northern* implicitly rejected the argument the government is now making. In *Great Northern*, the government primarily argued that 1875 Act rights-of-way are easements. U.S. *GN* Br. at 8-35. In the alternative, and to distinguish this Court's earlier limited fee decisions, such as *Townsend*, the government argued that, if the 1875 Act granted a "limited fee," that interest included only "a 'fee' in the surface and so much of the subsurface as is necessary for support – a 'fee' for a railroad thoroughfare exclusively." *Id.* at 35-37. That this Court did not mention this limited-fee-in-the-surface argument demonstrates how strongly

this Court believed that the 1875 Act granted only an easement.

The government now seeks to revive its limited-fee-in-the-surface argument. U.S. Br. at 16, 22-23; *see* Dist. Ct. Dkt. No. 148 at 3 (The government is claiming only "the right-of-way itself, which comprises only the surface and as much of the subsurface as is needed to accomplish the [railroad's] purpose."). The government must rely on this argument because reversionary interests may exist only in fees, not easements. *See* Cato Br. at 26-28. Yet, the government's argument suffers from the same infirmities as it did in 1942.[4]

The government argues that because the right-of-way grant in Section 1 of the 1875 Act is "materially identical" to pre-1871 railroad right-of-way grants, the language should be read *in pari materia*. U.S. Br. at 17-18. Not only is this argument directly contrary to what the government argued in *Great Northern*, it is the argument the railroad unsuccessfully made before this Court. *See* Petition for Writ of Certiorari, *Great Northern Ry. Co. v. United States*, No. 149 at 12-13 (1941).

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[4] The limited-fee-in-the-surface argument effectively splits the surface estate. However, Congress first split estates 34 years after the 1875 Act when it passed the 1909 Coal Lands Act, 30 U.S.C. § 81. *See Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 868-70 (1999).

The pre-1871 railroad right-of-way grants upon which the government now relies were passed during a different era of American history:

> The year 1871 marks the end of one era and the beginning of a new in American land-grant history. In that year the policy of lavish grants of land to encourage railroad construction was replaced by a new policy of severe restriction of federal munificence in respect of railroads. It is in the light of this shift that the Act of 1875 must be read. . . .

U.S. *GN* Br. at 15; *Great Northern*, 315 U.S. at 273. Because of this shift in policy, the right-of-way grant in Section 1 of the 1875 Act cannot be read *in pari materia* with the right-of-way grant in pre-1871 railroad land grant acts.[5] U.S. *GN* Br. at 29-31; *see Smith v. City of Jackson, Miss.*, 544 U.S. 228, 260-61 (2005) (O'Connor, J., dissenting) ("[W]e have not hesitated to give a different reading to the same language – whether appearing in separate statutes or in separate provisions of the same statute – if there is strong evidence that Congress did not intend the language to be used uniformly."). This is clear from *Great Northern*, wherein this Court ruled 1875 Act rights-of-way are easements, while leaving undisturbed

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[5] In contrast, the 1875 Act and the Act of March 3, 1891, 26 Stat. 1095, 1101-02 (1891) (codified at 43 U.S.C. §§ 946-949) are read *in pari materia* and both are construed as granting an easement. *Great Northern*, 315 U.S. at 275-76; Solicitor's Opinion M-36597, 67 I.D. 225 (1960).

its earlier rulings that rights-of-way granted by pre-1871 acts are limited fees. *See* 315 U.S. 273 n.6.

Section 2 of the 1875 Act further confirms that the right-of-way grant cannot be read *in pari materia* with the pre-1871 railroad right-of-way grants. This section, which is not found in any of the pre-1871 railroad acts, provides that under certain circumstances a railroad must share the "use and occupancy" of its 1875 Act right-of-way "in common" with other railroads, wagon roads, and highways. 43 U.S.C. § 935. This language demonstrates that 1875 Act rights-of-way granted non-exclusive "use and occupancy" rather than the land, which differentiates 1875 Act rights-of-way from the pre-1871 railroad right-of-way grants.[6] *See* U.S. *GN* Br. at 10-11.

Any lingering doubt that the 1875 Act should not be read *in pari materia* with the pre-1871 railroad right-of-way grants is dispelled by Section 4 of the 1875 Act. The importance of Section 4 cannot be understated because the right to dispose of the lands "subject to" an existing railroad right-of-way is not found in any of the pre-1871 railroad right-of-way acts. U.S. *GN* Br. at 30 n.34. Similar language first appeared in the Act of April 12, 1872, 17 Stat. 52 (1872). *Great Northern*, 315 U.S. at 271. This Court

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[6] Even if 1875 Act rights-of-way are primarily "exclusive," as suggested by the government, U.S. Br. at 22 n.4, that does not make 1875 Act rights-of-way fee interests. Amicus Curiae Brief of New England Legal Foundation at 4-12 ("NELF Br.").

found the following statement as to why the "subject to" clause was included in the Act of April 12, 1872, very compelling as to why the 1875 Act granted only an easement:

> "Mr. SLATER: The point [of this clause] is simply this, the land over which this right of way passes is to be sold subject to the right of way. It simply provides that *this right of way shall be an incumbrance upon the land* for one hundred feet upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way."

Great Northern, 315 U.S. at 271 n.3 (emphasis added) (quoting Cong. Globe, 42d Cong., 2d Sess., 2137 (1872)). That the right-of-way granted in 1875 Act is an "incumbrance" shows that the grant of a fee was not intended. *See id.* at 271.

Largely ignoring Sections 2 and 4 of the 1875 Act, the government cites Section 3 in support of its *in pari materia* argument. This section provides that, in the absence of a territorial law providing the "manner in which private lands and possessory claims on the public lands . . . may be condemned," a condemnation may proceed in accordance with Section 3 of the 1864 Pacific Railway Act, 13 Stat. 356-65 (1864). 43 U.S.C. § 936. According to the government, Section 3 of the 1864 Pacific Railway Act allows the condemnation of "full title." U.S. Br. at 24-25 (quoting 13 Stat. 357). From this, the government surmises that the 1875 Act must grant a similar interest. U.S. Br. at 26.

There are at least two flaws in the government's argument, which explains why the railroad was unsuccessful when it made the same argument in *Great Northern*. *See* Petition for Writ of Certiorari, *Great Northern, supra,* at 18-20.

First, that Section 3 of the 1875 Act provides for a condemnation in accordance with territorial laws or the 1864 Pacific Railway Act sheds no light on the property interest that may be condemned. Congress was simply identifying which procedures to be used if a condemnation were necessary. This is evident from the elaborate procedures set forth in Section 3 of the 1864 Pacific Railway Act, which provides, *inter alia*, that: (1) "three disinterested commissioners" shall make the initial determination of the amount of compensation owed; (2) the commissioner shall appraise the "premises at what would have been the value thereof if the road had not been built"; (3) upon payment of the amount awarded by the commissioners the railroad "shall thereby acquire full title to the same for the purposes aforesaid"; and (4) either party may appeal the award and demand a jury trial upon posting a bond for the costs on appeal. 13 Stat. 357-58.

Second, "full title" does not mean "fee title." This is clear when the words "full title," as used in Section 3 of the Pacific Railway Act, are placed in context:

> [U]pon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owner

> thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire *full title to the same for the purposes aforesaid*. . . .

13 Stat. 357 (emphasis added). Because the "purposes aforesaid" are railroad purposes, *id.*, a condemnation under the procedures in Section 3 of the 1864 Pacific Railway Act simply results in the railroad acquiring "full title" to an interest for railroad purposes. As the government aptly demonstrated in *Great Northern*, a railroad does not need "fee title" to successfully operate:

> Nor can it be argued that railroads, in order to operate efficiently, must have a fee in their rights of way. [The railroad] conceded in its brief in the court below . . . that railroads, when they condemn land for rights of way, "do not acquire mineral rights *or full fee ownership*." If the railroads do not need a fee in those portions of their rights of way acquired by eminent domain proceedings, and the courts have so held, the need for a fee in those portions of their right of way acquired under the 1875 Act is no more compelling. *Hence, it scarcely can be said that the purpose of the 1875 grant will be frustrated if it be construed as conveying an easement rather than a fee.*

U.S. *GN* Br. at 14 (all emphasis added) (footnote omitted). This Court agreed, observing "it has been held that railroads do not have a fee in those portions of their rights of way acquired by eminent domain

proceedings." *Great Northern*, 315 U.S. at 272 n.5 (listing cases). Thus, Section 3 of the 1875 Act merely shows that a railroad may condemn an easement for railroad purposes.

II. THE GOVERNMENT'S RELIANCE ON *STALKER* AND *STEINKE* IS MISPLACED.

The government relies on *Stalker v. Oregon Short Line R.R. Co.*, 225 U.S. 142 (1912), and *Great N. Ry. Co. v. Steinke*, 261 U.S. 119 (1923), for the proposition that a patent issued subject to an 1875 Act right-of-way conveys no interest in the right-of-way. U.S. Br. at 28-32. Because *Stalker* and *Steinke* were issued before *Great Northern* and involved rival claimants seeking the same land in fee, the government's reliance on these cases is misplaced.

In *Stalker*, a railroad claimed an 1875 Act right-of-way for station grounds based upon the filing of a map thereof with the local land office under Section 4 of the 1875 Act. *Oregon Short Line R. Co. v. Stalker*, 94 P. 56, 60 (Idaho 1907). The map was submitted to the Secretary for approval and, while that approval was pending, a settler made a preemption claim on 160 acres; 12 of which included the station grounds claimed by the railroad. *Id.* The Secretary finally approved the map for the station grounds, but the local land office failed to note the approval on the plats in the local land office. *Id.* Subsequently, a patent was issued to the settler that made no reference to the station grounds. *Id.*

As acknowledged by the government, the railroad sued the settler's successors claiming that it owned the station grounds in "fee." U.S. Br. at 28-29. The Idaho Supreme Court held in favor of the railroad because the railroad had done everything required of it under the law by filing its map before the preemption claim was initiated. *Stalker*, 94 P. at 65-66. Because the railroad's claim to the station ground was first in time, the court ruled the railroad should not suffer for the delay in the Secretary's approval or for the neglect exhibited by the local land office. *Id.* at 65. In response to the argument of the conclusiveness of the patent issued to the settler, the court, mistakenly relying on *Townsend,* believed that the railroad had an inchoate right to a limited fee in the station grounds upon filing its map. *Id.* at 64-65. As the interest was a limited fee, the station grounds were not open to disposition under the public land laws when the settler entered the lands and the Land Department had no authority to transfer the lands to the settler when it issued the patent. *Id.* at 66.

This Court affirmed. *Stalker*, 225 U.S. at 154. In so doing, this Court held that neither the Secretary's delay nor the neglect of the local land office could affect the priority of the railroad. *Id.* at 150-53. In rejecting the argument that the settler's patent trumped the railroad's senior claim, this Court explained:

> [T]he subsequent issue of a patent to the land entered by [the settler] was subject to the rights of the railroad company theretofore acquired by approval of its station

> ground map. The patent is not an adjudication concluding the paramount right of the [railroad], but in so far as it included lands validly acquired theretofore, was in violation of law, and inoperative to pass title.

Id. at 154. Although this Court did not expressly mention what type of interest the railroad held in the station grounds, it may be presumed that this Court mistakenly believed the interest to be a fee. *See Stalker*, 94 P. at 64 ("The estate granted under the act of March 3, 1875, is more than a mere easement. It amounts to a base[,] qualified or limited fee. . . .").

In *Steinke,* a local land office again failed to note the Secretary's approval of a map for 1875 Act station grounds on the plats in the local land office. *Steinke*, 261 U.S. at 121. Subsequently, a settler entered a 40-acre parcel that contained the approved station grounds and, ultimately, a patent to the 40-acre parcel was issued, which made no mention of the station grounds. *Id.* at 121-22. The railroad sued to quiet title to the station grounds against the settler's grantees. *Id.* at 120.

This Court held in favor of the railroad. *Steinke*, 261 U.S. at 121. In so doing, this Court ruled "[t]he approved map is intended to be the equivalent of a patent" and the failure of "local land officers . . . to note that disposal" on the plats in the local land office could "not prejudice or affect the [railroad's] title," because "a neglect of duty affords no justification for subordinating a senior to a junior claim or for making a second disposal in disregard of a prior one." *Id.* at

125-29. This Court also reaffirmed *Stalker*'s ruling that a subsequent patent could not convey previously appropriated lands. *Id.* at 130-31. Again, it may be presumed that this Court mistakenly believed that the station grounds were held in fee. *See Steinke*, 261 U.S. at 133 (citing *Townsend*).

Stalker and *Steinke* stand for an unremarkable principle that when a senior claimant acquires a vested or inchoate right to a fee interest under the public land laws, the land is appropriated (*i.e.*, no longer subject to disposition under the public land laws) and the government cannot convey to a junior claimant that which is already appropriated. *See Wilcox v. Jackson*, 38 U.S. 498, 513 (1839) (describing "appropriation doctrine"). From this, the government makes the extraordinary leap that a subsequent patent issued for lands traversed by an 1875 Act right-of-way cannot convey any interest in the right-of-way itself. U.S. Br. at 31-32. Yet, nothing in *Stalker, Steinke,* or the appropriation doctrine suggests that: (1) the government impliedly retains any interest in an 1875 Act right-of-way when it patents the lands traversed thereby in fee; or (2) that the government does not convey any interest *it* may still have in an 1875 Act right-of-way, such as an implied reversionary interest, when it patents the lands in fee without reserving that interest.[7] *See* Cato Br. at

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[7] Brandt's parents did not make an entry under the public land laws; they acquired the land under the General Exchange Act, 16 U.S.C. § 485-486, Pet. App. 76-79, under which the United

(Continued on following page)

13-14; 4 *Simes and Smith, The Law of Future Interests*, § 1852 (3d ed. 2013) (reversionary interests are freely alienable). Moreover, the government does not cite a single post-*Great Northern* case for its proposition, which is not surprising because post-*Great Northern* authorities demonstrate that 1875 Act rights-of-way do not effectuate an appropriation.

In *Chicago & N. W. Ry. Co. v. Continental Oil Co.*, 253 F.2d 468, 470 (10th Cir. 1958) the government granted a 40-acre tract to Wyoming that was traversed by an 1875 Act right-of-way. An oil company acquired an oil and gas lease from Wyoming that covered the 40-acre tract and brought suit against the railroad to enjoin the railroad from drilling on the right-of-way. *Id.* Although the railroad acknowledged "the decisional force of" *Great Northern* that the interest it held in the right-of-way "was merely an easement," *id.* at 470-71, it defended on the basis of the appropriation doctrine as stated in pre-*Great Northern*, limited-fee cases, such as *Stalker* and *Steinke*. *Id.* at 471-72. The Tenth Circuit, however, rejected the railroad's appropriation argument vis-à-vis the 1875 Act right-of-way because it was "merely another way of urging the limited fee concept" that was rejected in *Great Northern*. *Id.* at 472; *see Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967) (noting that the government "concede[d]" post-1871 railroad rights-of-way did not appropriate the land

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States had to expressly reserve any interests it wished to retain. 16 U.S.C. § 486.

from disposition under the public land laws); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1003-07, 1016-20 (S.D. Ind. 2005) (appropriation doctrine does not apply to 1875 Act rights-of-way, but does apply to pre-1871 railroad rights-of-way).

In an effort to breathe life into *Stalker* and *Steinke*, the government argues that *Great Northern* cited both cases "favorably." U.S. Br. at 52. The government, however, fails to acknowledge the principles for which *Great Northern* cited those cases. *Stalker* was cited for the principle that an 1875 Act right-of-way may be acquired by "construction." *Great Northern*, 315 U.S. at 272 n.4. *Steinke* was cited for the principle that the 1875 Act "is to be liberally construed to carry out its purposes" but is "also subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor[,]" *i.e.*, "nothing passes but what is conveyed in clear and explicit language. . . ." *Great Northern*, 315 U.S. at 272 (internal quotation omitted). In keeping with this latter principle, *Great Northern* ruled that the 1875 Act granted the lesser of the three possible interests, *i.e.*, an easement. Ironically, the government's new interpretation of the 1875 Act violates the principle for which *Great Northern* cited *Steinke*.

III. THE LEGISLATIVE HISTORY SHOWS THAT 1875 ACT RIGHTS-OF-WAY ARE EASEMENTS.

The government argues that the legislative history shows that Congress intended to impliedly reserve a reversionary interest in 1875 Act rights-of-way. U.S. Br. at 32-34. As this Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005). This is because "legislative history is itself often murky, ambiguous, and contradictory . . . [and] has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." *Id.* at 568 (internal quotations omitted).

In any case, and contrary to the government's suggestion, the legislative history shows that Congress intended to grant a common-law easement. *See Great Northern*, 315 U.S. at 271 n.3. Furthermore, there is no evidence in the legislative history that Congress intended to impliedly reserve a reversionary interest in 1875 Act rights-of-way after the lands traversed thereby were patented.

When Chairman Townsend of the House Committee on Public Lands presented the bill that would become the 1875 Act, he assured the House that the bill was unlike the pre-1871 railroad grants:

> [We] have been very conservative with regard to the appropriation of public lands to railroads. A few years ago such grants of

> lands were given with a very large degree of liberality until the people put the mark of their disapprobation upon them. . . . *[We] have endeavored to preserve the public lands for the benefit of actual settlers*. . . . All our grants of public lands, therefore, have been narrowed down to rights of way.

3 Cong. Rec. 404 (1875) (emphasis added); 3 Cong. Rec. 407 (1875) (Representative Hawley describing the bill as granting railroads "the right to lay their tracks and run their trains over the public lands; it does no more"); *see also* 3 Cong. Rec. 1791 (1875) (Senator Sprague describing a similar railroad right-of-way grant as granting "no land, not an acre.").

Because the legislative history does not mention an implied reversionary interest, the government tries to create one from the colloquy between Chairman Townsend and Representative Hoar regarding an amendment proposed by Representative Hoar to give subsequently created states authority over 1875 Act rights-of-way. 3 Cong. Rec. 406 (1875). Representative Hoar hypothesized that, without the amendment, states would lack the authority to regulate or exercise the power of eminent domain over the rights-of-way. *Id.* In response, Chairman Townsend seemingly agreed that states lacked that authority vis-à-vis the right-of-way granted under the Pacific Railway Act. *Id.* According to the government, this colloquy shows that the right-of-way granted under the 1875 Act – like those granted under pre-1871 acts – would be immune from state regulation, including the power of

eminent domain, because of a continuing interest by the government in the right-of-way. U.S. Br. at 33. The government then surmises that 1875 Act rights-of-way must be identical to the pre-1871 rights-of-way "at least to the extent that the United States would hold a form of ownership interest in the right-of-way, even after" the lands traversed thereby were patented into private ownership. U.S. Br. at 33-34.

The government is misguided. First, nothing in the colloquy suggests there is an implied reversionary interest in any railroad rights-of-way. Second, the government misreads the colloquy. *See* NELF Br. at 15-17 (placing the colloquy in proper context). Finally, Representative Hoar and Chairman Townsend were wrong to the extent that they believed pre-1871 rights-of-way were immune from regulation by the states, including the power of eminent domain.

In holding that the 1864 Northern Pacific Railway Act, 13 Stat. 365 (1864), granted a "limited fee, made on an implied condition of reverter" this Court explained that the right-of-way would be subject to state regulation, including the power of eminent domain, notwithstanding the government's possibility of reverter: "nothing that has been said in anywise imports that a right of way granted through the . . . public domain within a state is not amenable to the police power of the state." *Townsend*, 190 U.S. at 272; *accord N. Coast Ry. v. N. Pac. Ry. Co.*, 94 P. 112, 114 (Wash. 1908) ("It has also been repeatedly held by other courts that a right of way of a railroad company, which has been acquired . . . through a federal grant,

is not exempt from the operation of state laws of eminent domain." (listing cases)). Because the participants in the colloquy were apparently acting under a mistake of law, the colloquy cannot be interpreted as evincing anything regarding Congress's intent, much less that Congress intended to impliedly reserve a reversionary interest in 1875 Act rights-of-way after the lands traversed thereby are patented.

IV. SUBSEQUENT LEGISLATION NEITHER AMENDED THE 1875 ACT NOR REDEFINED PREVIOUSLY GRANTED RIGHTS-OF-WAY.

It is axiomatic that the 1875 Act must be interpreted in accordance with Congress's intent in 1875. *Amoco*, 526 U.S. at 866 ("[p]ublic land statutes should be interpreted in light of the country's condition when they were passed" (citing *Leo Sheep*, 440 U.S. at 682)). In contravention of this principle, the government suggests that the nature of 1875 Act rights-of-way should be determined from the forfeiture acts of 1906 and 1909, codified at 43 U.S.C. § 940.[8] U.S. Br. at 34-37. Specifically, the government argues that 43 U.S.C. § 940 "manifest[s]" Congress's "intent that the United States retain a reversionary interest in 1875 act

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[8] *Great Northern* found that these forfeiture acts *and* 43 U.S.C. § 944 confirmed that the 1875 Act granted an easement. 315 U.S. at 276-77; *see* Brief of Petitioners at 22, 24-25. The government simply ignores 43 U.S.C. § 944.

rights-of-way. . . ." U.S. Br. at 34. According to the government, 43 U.S.C. § 940 creates a two-step process: (1) upon a forfeiture, the government resumes "full title" to 1875 Act right-of-way; and (2) the right-of-way is then transferred by 43 U.S.C. § 940 to patentees who were conveyed lands "subject to" the right-of-way. U.S. Br. at 36.

Instead of creating a "two-step" process, 43 U.S.C. § 940 covers two different scenarios depending on where the forfeited right-of-way is located: (1) on lands still owned by the government; or (2) on lands that were patented "subject to" the right-of-way. Under the first scenario, the government naturally "resumes the full title to the lands covered thereby free and discharged from such easement. . . ." 43 U.S.C. § 940. Under the second scenario, however, "the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of" the owner of the lands burdened by the easement. 43 U.S.C. § 940. Thus, 43 U.S.C. § 940 confirms Congress's intent in passing the 1875 Act that abandoned 1875 Act rights-of-way inure to the benefit of settlers. *See Hash v. United States*, 403 F.3d 1308, 1315 (Fed. Cir. 2005).

The government also argues that 43 U.S.C. § 912, passed in 1922, shows Congress believed that it had impliedly reserved a reversionary interest in 1875 Act rights-of-way. U.S. Br. at 38-40. The views of a subsequent Congress generally "form a hazardous basis for inferring the intent" of an earlier one, *United States v. Price*, 361 U.S. 304, 313 (1960), and statutes should

not be construed so as to retroactively redefine previously granted property interests. *See Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994). In any event, this Court's decisions in *Townsend* and *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44 (1915) and the abandonment of railroads in the 1920s triggered passage of § 912. Brief of Petitioners at 7-8. Under these decisions, the government would be saddled with narrow strips on land (surface and minerals) in fee upon abandonment. *Id.* at 42-44. To avoid this result, Congress passed § 912 to dispose of the surface *it may have* in any abandoned railroad rights-of-way under these decisions, while reserving the minerals.[9] 43 U.S.C. § 912; Brief of Petitioners at 42-44; *see* NARPO Br. at 20-34.

Nothing in § 912 or any other subsequently enacted statute suggests that Congress, in passing the 1875 Act, intended to impliedly reserve a reversionary interest in 1875 Act rights-of-way after the lands traversed thereby were patented. In short, "[w]hat the [government] asks is not a construction of [the 1875 Act], but, in effect, an enlargement of it by [this Court], so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250-51 (1926).

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[9] That Brandt owns the minerals underlying the abandoned right-of-way, demonstrates that § 912 does not apply in this case. *See* Brief of Petitioners at 43 n.15.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR CATO INSTITUTE, AMERICAN FARM BUREAU FEDERATION, AMERICAN LAND TITLE ASSOCIATION, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, PUBLIC LANDS COUNCIL AND PROFESSORS OF PROPERTY LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

The American Farm Bureau Federation was formed in 1919 to protect, promote and represent the business, economic, social and educational interests of more than 6.1 million member families in all fifty states and Puerto Rico.

The American Land Title Association, founded in 1907, is a national trade association and voice of the real estate settlement services, abstract and title insurance industry – businesses that search, review, and insure land titles to protect homebuyers, real estate investors, and mortgage lenders who invest in real estate. ALTA represents about 4,800 member companies operating in every county in every state of the nation.

The National Cattlemen's Beef Association is the national trade association representing the entire cattle industry. The Association represents nearly

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[1] *Amici curiae* affirm under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties have consented to the filing of this brief.

139,000 cattle producers and 45 affiliated state associations throughout the United States and works to advance the economic, political and social interests of the American cattle business.

The Public Lands Council represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. The Council's members are state and national cattle, sheep, and grasslands associations throughout the western United States.

Professors James W. Ely, Jr., Richard A. Epstein, Donald Kochan and Dale A. Whitman are professors of property law. These professors are noted scholars and have authored several leading texts, treatises, and articles on real property, some of which are referenced in this brief.

BACKGROUND

In 1908, the federal government granted Laramie Hahn's Peak & Pacific Railroad Company a right-of-way easement across a strip of land then owned by the United States. This easement was granted under the General Railroad Right-of-Way Act of 1875 ("1875 Act").[2] Later, in 1976, the government issued a land patent conveying a tract of land to the Brandt Family. The patent included land encumbered by the right-of-way easement originally granted the railroad. The patent contains no provision by which the United States retained any interest in the land encumbered by the railroad right-of-way.

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[2] Codified at 43 U.S.C. §§ 934, *et seq.*

The railroad obtained only an easement to use a strip of land for operation of a railway. *See Great Northern*, 315 U.S. at 277 (holding a railroad "has only an easement in its rights of way acquired under the Act of 1875").

On appeal, the Tenth Circuit held that, even though the United States patented the land without expressly retaining any interest in that land encumbered by the railroad right-of-way, the United States nonetheless retained an "implied reversionary interest" in the right-of-way land. *United States v. Brandt*, 496 Fed. App'x 822, 824 (10th Cir. 2012). The Tenth Circuit further concluded, "interests in abandoned railroad rights-of-way generally revert to the United States rather than the adjacent landowners." *Id.* at 825 (citation omitted). The panel said this holding was dictated by its prior decision in *Marshall v. Chicago & Nw. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994).

The Tenth Circuit acknowledged this holding was directly contrary to holdings of the Federal and Seventh Circuits. *See Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (Newman, J.), and *Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 649 F.3d 799 (7th Cir. 2011) (Posner, J.). Rehearing was sought and denied. This Court granted *certiorari* to consider whether the United States retained an "implied reversionary interest" in 1875 Act rights-of-way after the underlying lands were patented into private ownership.

The *Amici* join this brief because the Tenth Circuit's holding is contrary to well-established principles of property law, is contrary to this Court's decisions, and

(if accepted) would unsettle title to millions of acres of land throughout the nation.

SUMMARY OF ARGUMENT

The United States does not retain an "implied reversionary interest" in land patented to private owners. Nor does the United States retain an "implied reversionary interest" in a railroad right-of-way easement established under the Act of 1875. The Tenth Circuit erred when it concluded the United States retained such an interest. The Tenth Circuit's holding, and the analysis by which the Tenth Circuit reached this holding, is contrary to this Court's jurisprudence, including its decisions in *Great Northern Ry. v. United States*, 315 U.S. 262 (1942) (Murphy, J.), and *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (Rehnquist, J.).

The Tenth Circuit further erred by failing to resolve a dispute over land title according to established rules of real property and settled common law doctrines. The Tenth Circuit particularly failed to distinguish between an *easement* to use land and ownership of the *fee estate* in the land.

The Tenth Circuit's decision violates the "special need for certainty and predictability where land titles are concerned" and should be reversed.

ARGUMENT

I. The Tenth Circuit's decision violates the "special need for certainty and predictability where land titles are concerned."

A. Owners' right to be secure in their property is one of the primary objectives for which the national government was formed.

The Framers drafted our Constitution embracing the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society...." JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, Ch. XI § 138.[3] Locke continued:

> [F]or a man's property is not at all secure, tho' there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have power to take from any private man, what part he pleases of his property, and use and dispose of it as he thinks good.

Id.[4]

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[3] *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008) (noting John Adams' proclamation "property must be secured or liberty cannot exist"), and RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (especially Part I., pp. 3-31).

[4] Blackstone wrote, "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisition, without any control

Madison declared, "Government is instituted to protect property of every sort....This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own...."[5]

Last term in *United States v. Jones*, 132 S.Ct. 945, 949 (2012) (Scalia, J.), this Court recalled Lord Camden's holding in *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P 1765):

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

Id.

This Court described Lord Camden's pronouncement as a "'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted." *Id.* at 949

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or diminution, save only by the laws of the land. The origin of private property is probably founded in nature." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Book I, § 191-92.

Kent similarly observed the constitutional protection of property is a "principle in American constitutional jurisprudence, [that] is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law." JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lecture XXXIV.

[5] THE COMPLETE MADISON at 267-68 (Saul K. Padover ed., 1953) published in NATIONAL GAZETTE (March 29, 1792).

(citing *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989) (Scalia, J.), and *Boyd v. United States*, 116 U.S. 616, 627 (1886) (Bradley, J.)).

Adam Smith similarly noted,

> The first and chief design of every system of government is to maintain justice: to prevent the members of society from incroaching on one another's property, or seizing what is not their own. The design here is to give each one the secure and peaceable possession of his own property.

ADAM SMITH, LECTURES ON JURISPRUDENCE (1978).[6]

In *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (Stewart, J.), this Court rightly observed, "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.... That rights in property are basic civil rights has long been recognized." (citations omitted).

More recently the Court observed, "an essential principle: Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) (Kennedy, J.).

We doubt there is serious dispute that protecting individuals' right to their property is a foundational purpose for which our national and state governments were established. But we begin from this point because

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[6] *See* STEVEN J. EAGLE, REGULATORY TAKINGS, Ch. 1 (5th ed. 2012) (discussing the historical source for property rights). *See also* DAVID A. THOMAS, THOMPSON ON REAL PROPERTY (2d ed.) Vol. 1.

the right landowners have to be secure in their property is undermined – or forfeited entirely – when title to property is not determined by established rules of property and principles of common law. Simply stated, faithful and consistent application of settled principles of property law is essential to secure an owner's fundamental right to their property.

B. This Court affirmed the need for "certainty and predictability" when determining title to land.

This Court unanimously held,

> [there is a] special need for certainty and predictability where land titles are concerned, [and this Court is] unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.

Leo Sheep, 440 U.S. at 687-88.

The States likewise recognize this principle. For example, Michigan's Supreme Court held:

> [I]f there is any realm within which the values served by *stare decisis* – stability, predictability, and continuity – must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that *stare decisis* is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance"....The justification for this rule is not to be found in rigid fidelity to precedent, but conscience....Judicial "rules of property" create

> value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital.

2000 Baum Family Trust v Babel, 793 N.W.2d 633, 655 (Mich. 2010) (Markman, J.) (internal citations omitted).[7]

In like vein, this Court recognized government cannot take landowners' property by redefining property interests without justly compensating the landowner as guaranteed by the Fifth Amendment.

In *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 8 (1990) (Brennan, J.) this Court held section 1247(d) of the National Trails System Act "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests." The taking occurs when the federal Trails Act is invoked to redefined existing railroad easements to now allow uses of land not originally granted and to perpetuate an easement that otherwise terminated.

Justice O'Connor (joined by Justices Kennedy and Scalia) concurred to emphasize the point:

> [A] sovereign, "by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing

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[7] Citing *Bott v. Natural Res. Comm.*, 327 N.W.2d 838, 849 (Mich. 1982); *see also Michigan DNR v. Carmody-Lahti Real Estate, Inc.*, 699 N.W.2d 272 (2005) (Young, J.).

> that the Taking Clause of the Fifth Amendment was meant to prevent."

Id. at 23 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (Blackmun, J.)), which, in turn, quoted *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (Blackmun, J.)).[8]

In *Webb's*, the Florida Supreme Court declared interest on funds deposited in the court registry was "public money." This Court said that was a taking in violation of the Fifth Amendment because:

> The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal....Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money"....

Webb's, 449 U.S. at 162, 164.

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[8] *Preseault* illustrates the unsettling effect of *ex post facto* redefinition of property rights. It took decades of costly litigation to finally resolve the nature of the Trails Act's easement across the Preseaults' land. Throughout this time, the Preseaults' title was clouded, and their ability to sell or mortgage their land was impaired. Uncertainty over title to land causes a significant decline in the value of property. *See* Lee J. Alston, Gary D. Libecap, Robert Schneider, *The Detriments and Impact of Property Rights, Land Titles and the Brazilian Land Frontier*, 12 J. L. ECON. & ORG. 25 (1996). (The Preseaults' property was taken in January 1986, and they were not paid until the summer of 2002. *See Preseault v. United States*, 52 Fed. Cl. 667 (2002).)

Webb's held the government's "redefinition" of property from private to public is a taking for which our Constitution compels that the owner be justly compensated. *See id.*

Similarly, in *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 130 S.Ct. 2592, 2601 (2010) (Scalia, J.), this Court reaffirmed the government "effect[s] a taking if they recharacterize as public property what was previously private property."

Joseph Story wrote:

> Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed and uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, VOL. III, § 1784 (1833).

Landowners' right to be secure in their property is only as secure as the government's – primarily the judiciary's – fealty to what this Court in *Leo Sheep* described as "settled expectations" of land title. 440 U.S. at 687-88. Property ownership is defined by established rules of property and common law doctrines. Arbitrarily changing these rules (or failing to follow these rules) unsettles established property interests.

C. The Tenth Circuit's decision undermines the "certainty and predictability" of land title.

Brandt does exactly what this Court admonished lower courts to avoid in *Leo Sheep*. The Tenth Circuit failed to apply settled principles of property law when called upon to determine title to land. The Tenth Circuit further erred when it defined (redefined is a more accurate description) an easement granted in 1875 through the lens of 1920s legislation and erred again when it embraced the notion of an "implied reversionary interest" supposedly retained by the United States. *Brandt*, 496 Fed. App'x at 824.

Millions of acres of privately-owned land are encumbered by railroad rights-of-way established under the 1875 Act.[9] If the United States holds an "implied reversionary interest" and if "abandoned railroad rights-of-way generally revert to the United States," then owners of hundreds of thousands, if not millions, of acres will lose title to their land.

(1) The United States does not retain "an implied reversionary interest" in land patented to private owners.

The Federal Circuit correctly observed this "Court's precedent has consistently held that absent an explicit reservation of an interest in land, such would not be implied." *Hash*, 403 F.3d at 1316 (citing *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 329 (1924),

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[9] *See* Brief of *Amici Curiae* Cato Institute, *et al.*, in support of granting *certiorari*, pp. 17-18.

Witherspoon v. Duncan, 71 U.S. 210, 219 (1866), and *United States v. Schurz*, 102 U.S. 378, 397 (1880)).

When the United States patents land to private owners, the private owner obtains the *entirety* of the fee simple estate. The private owners' interest is limited only by (a) the United States' prior grant of an interest in the land to a different owner; or, (b) an interest the United States itself expressly reserved in the land patent. *See, e.g.*, *Boesche v. Udall*, 373 U.S. 472, 477 (1963) (a land patent "divests the [g]overnment of title"); *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 49 n.9 (1983) (holding once the land patent issued, the government had no recourse, even when the patent was erroneously issued); and *Swendig*, 265 U.S. at 331 ("it is true as a general rule, that when...entry is made and certificate given, the land covered ceased to be a part of the public lands...[and] all title and control of the land passes from the United States"); *see also Witherspoon*, 71 U.S. at 219, and *Schurz*, 102 U.S. at 397. This Court has *never* recognized a notion the United States retains an "implied" interest in land patented to private ownership.

The Tenth Circuit, however, held the United States "impliedly" reserved an interest in the land under the railroad right-of-way. Land patents (like a deed) are interpreted according to the plain meaning of the words used in the document. This is how all legal instruments are interpreted. *See* ANTONIN SCALIA AND BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012), p. 93. "Nor should the judge elaborate unprovided-for exceptions to a text." *Id.* (citing Justice Blackmun, "[I]f the Congress [had] intended to provide additional exceptions, it would

have done so in clear language." *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting)).

If the United States wanted to retain any interest in that strip of land encumbered by the railroad right-of-way, it could have stated this intention in the land patent. The United States did not do so. And the Tenth Circuit was wrong to suppose the United States did by "implication" what the United States elected not to do by express provision.

(2) Applying established rules of property law to resolve disputes over title to land secures ownership of property.

In *Marshall*, the Tenth Circuit said, "The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property." 31 F.3d at 1032.[10]

This is the Tenth Circuit's fundamental error. Competing claims to land cannot be resolved without considering the "specific category [of ownership interest] under the rules of real property." Ignoring rules of real property (here the distinction between "easements" and a "fee estate") results in an arbitrary decision that unsettles established land title and can result in a *de facto* taking of property.

When the rules of property law and the common law doctrines governing land title are disregarded, an

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[10] *Brandt* said *Marshall* compelled the *Brandt* panel to reach its conclusion. *Brandt*, 496 Fed. App'x at 824.

owner's title to land becomes nothing more than the unmoored whim of a particular court on a particular day.

The Tenth Circuit determining the Brandt's title to their land without regard to the rules of property and without distinguishing between an easement and a fee estate is like trying to play baseball when the strike zone is different with each pitch.

We explain below how the Tenth Circuit's holding and analysis is contrary to the rules of real property and common law doctrines. For now, we simply make the point that a court *must* apply established rules of real property when determining title to land.

Securing private ownership of property is a fundamental requirement for economic prosperity.[11]

Thomas Sowell observed,

> For fostering economic activities and the prosperity resulting from them, laws must be reliable, above all. If the law varies with the whims of kings or dictators, with changes in democratically elected governments, or with the caprices or corruption of appointed officials, then the risks surrounding investment rise, and consequently the amount of investing is likely to be less than . under a reliable framework of laws.

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[11] "Clarity of legal title has been the foundation of all modern economic growth." Mark Ellis, *Legal Profession Must Shape Our Post-Crisis Future,* INT'L B. NEWS (Oct. 2010), p. 7.

> One of the important advantages that enabled nineteenth-century Britain to become the first industrialized nation was the dependability of its laws.

THOMAS SOWELL, BASIC ECONOMICS (2000), p. 239.

Nations prosper when private property rights are well-defined and enforced. *See*, for example, the acclaimed work of economist Hernando de Soto in THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000). De Soto found one of the most substantial factors underlying America's prosperity to be our legal system providing established and consistent rules governing ownership of property.[12]

Donald Kochan notes, in *Certainty of Title: Perspectives After the Mortgage Foreclosure Crisis on the Essential Role of Effective Recording Systems*:

> Certainty of ownership is necessary to facilitate private market-based transactions....The first role of the government in promoting certainty is to minimize its capacity to disrupt market transactions. With constitutional limits or self-restraint, the government can add certainty into the market place for property....The second way...is to provide a neutral system for the resolution of private disputes and the

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[12] *See also* Acemoglu, Daron, and Simon Johnson, *Unbundling Institutions*, JOURNAL OF POLITICAL ECONOMY (October 2005), pp. 949-95 (finding well-defined and enforced rules protecting property ownership is one of the most important factors determining a nation's long-run economic growth and prosperity).

> enforcement of agreements according to the *original* terms of the transacting parties and consistent with their rights....When it comes to the courts....[t]here must be objectivity and neutrality in the resolution of disputes such that the judgments of the adjudicating parties are sufficiently predictable *ex ante*.

66 ARK. L. REV. 267, 301, 304-05 (2013) (emphasis added). *See also* Todd J. Zywicki, *The Rule of Law, Freedom and Prosperity*, 10 SUP. CT. ECON. REV. 1, 22 (2003) ("Individuals are more willing to invest...where property rights are stable, contracts are secure, and arbitrary governmental action is restrained.").

Richard Pipes, in his work, PROPERTY AND FREEDOM (1999), similarly observed:

> Property is an indispensable ingredient of both prosperity and freedom. The close relationship between property and prosperity is demonstrated by the course of history, which shows that one of the main reasons for the rise of the West to the position of global economic preeminence lies in the institution of property.

Id. at 286.

(3) The Tenth Circuit wrongly redefined property interests established by the 1875 Act on the basis of 1920s legislation.

The Tenth Circuit wrongly accepted the government's premise which the Federal and Seventh Circuits rightly rejected; namely, property interests established by the 1875 Act and land patents under the

Homestead Act of 1862 can be defined (or redefined) by subsequent government enactments and policies. This concept is wholly contrary to this Court's holding in *Boesche*, 373 U.S. at 477, that a land patent "divests the government of title."

The notion the United States can convey land to a private owner and then, decades later, enact some policy that has the effect of retroactively redefining the nature of the property originally conveyed is repugnant to the principle of certainty and predictability.

In *Samuel C. Johnson*, the Seventh Circuit held the 1875 Act did not provide even a "hint" by which a landowner "would suspect a lurking governmental right so unsettling to the security of private property rights." 649 F.3d at 803.

The Tenth Circuit's supposition that subsequent government enactments somehow define (or redefine) earlier land-grants is also contrary to this Court's jurisprudence. *See Hastings v. Whitney*, 132 U.S. 357, 360 (1889) (Lamar, J.), stating:

> [T]he doctrine first announced in *Wilcox v. Jackson*, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, has been reaffirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

The Tenth Circuit, contrary to this doctrine, concluded the United States retained an "implied" interest in land encumbered with a 1875 Act right-of-way and patented to private ownership, under the Homestead Act of 1865, on the basis of a 1920 statute, 43 U.S.C. § 913.

But, even if we do consider this subsequent statute, it still does not support the Tenth Circuit's conclusion. The Federal Circuit rightly noted, "an authorization to railroads to share their 200-foot wide right-of-way with local highway needs does not mandate the conclusion that the United States retained the fee to the land underlying the right-of-way after land patents including that land were granted to private persons." *Hash*, 403 F.3d at 1317.

II. The Tenth Circuit further erred by failing to follow common law rules of property recognizing important differences between "easements" and the "fee estate."

A. An "easement" is not an interest in the "fee estate."

In *Great Northern*, 315 U.S. at 271, this Court held "The Act of March 3, 1875, from which [the railroad's] rights stem, *clearly grants only an easement, and not a fee*" (emphasis added). This Court continued, "the right is one of passage." *Id.*

According to this Court's holdings, ownership of the fee estate in land subject to an 1875 Act right-of-way easement was retained by the United States until it was patented to private ownership. And, when the United States patents land to private ownership (here the Brandt family), it conveys *the entirety* of the fee

estate, unless the land patent expressly retains a defined interest in the land. *See Boesche, Watt* and *Swendig, supra.*

The United States did not expressly retain *any* interest in that land encumbered by the 1875 Act easement. When railroad operations ceased and the easement terminated, the Brandt family's fee estate (the servient interest) became unencumbered by the former railroad easement.

The forgoing is how the title dispute between the Brandt family and the United States resolves under established rules of real property. These rules require us to distinguish between an "easement" and "fee estate."

But in *Marshall,* the Tenth Circuit said it construed title "regardless of the precise nature of the [property] interest" and that it need not consider the "rules of real property." 31 F.3d at 1032. And this is exactly the problem with the Tenth Circuit's analysis. Disregarding traditional "rules of real property" lead the Tenth Circuit to make the nonsensical statement "interests in abandoned railroad rights-of-way generally revert to the United States rather than the adjacent owners." *Brandt*, 496 Fed. App'x at 825.

An easement is a nonpossessory interest in the land of another. *See* JON W. BRUCE AND JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND (2013) § 1:1. An easement is "an interest in land, but it is not

an estate." *Id.* § 1.21 (citing, among other authorities, 4 POWELL ON REAL PROPERTY § 34.02[1]).[13]

The fundamental, and critical, difference between an easement and fee estate is a foundational concept of property law.

For example, the Montana Supreme Court noted, "[t]he important distinction between an easement and a fee simple is that the former describes the right to a use of land which is specific or restrictive in nature, while the latter is the grant of title to the land itself." *Park Cnty. Rod & Gun Club v. Dept. of Highways*, 517 P.2d 352, 355 (Mont. 1973). The Florida Court of Appeals similarly held, "An easement, or right to use land not owned, is more in the nature of a claim or encumbrance against the title to the land than it is in the nature of title to, or an estate in, the land itself." *Dean v. MOD Props., Ltd.*, 528 S.2d 432, 433 (Fla. Ct. App. 1988).

Bruce and Ely observe, "This difference is significant because fee owners receive substantive and procedural rights unavailable to easement holders." THE LAW OF EASEMENTS § 1:21 (citing 2 AMERICAN LAW OF PROPERTY § 8.21 and CUNNINGHAM, STOEBUCK AND WHITMAN, THE LAW OF PROPERTY § 8.1 (2d ed.)).[14]

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[13] *See also* THOMPSON ON REAL PROPERTY § 60.02(a) (citing the RESTATEMENT OF PROPERTY) ("an easement is 'an interest in the land in the possession of another' that entitles the easement owner to 'limited use or enjoyment' of that land").

[14] The word "fee" is occasionally used by courts and drafters to describe the *duration* of an easement as perpetual. This engenders confusion. "Cases occasionally contain the assertion that

B. This Court respects the distinction between an "easement" and the "fee estate" when construing ownership of railroad rights-of-way.

This Court held Congressional land-grants to railroads made before 1871 generally granted the railroad a "limited fee." Whereas, those made after 1871 granted the railroad only an easement.

For example, in *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903), considering an 1864 Act land-grant, this Court held, "In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Congressional largess to railroads (granting railroads the fee estate in public lands) ended in 1871. This Court found a railroad obtained a "limited," "base," or "qualified" fee interest in "land-grant[s] before the shift in Congressional policy occurred in 1871." *Great Northern*, 315 U.S. at 278. This Court clarified this point when it corrected the erroneous description of the railroad's interest the Court made in *Rio Grande W. R. Co. v. Stringham*, 239 U.S. 44, 47 (1915) (Van Devanter, J.).

Stringham described the interest a railroad acquired under the 1875 Act as "neither a mere

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easements may be held in fee or as a defeasible fee." THE LAW OF EASEMENTS §§ 1:21, 10.1. "Such statements are unnecessarily confusing. One need not refer to the hierarchy of estates in land to identify the longevity of an easement." *Id.*

easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter" (essentially following *Townsend*). *Id.*

In *Great Northern*, however, this Court corrected itself and said *Stringham* was incorrect and "based on cases arising under the land-grant acts passed prior to 1871." 315 U.S. at 279. This Court explained, "it does not appear that Congress' change of policy after 1871 was brought to the Court's attention" and "no brief was filed by the defendant or the United States." *Id.* at 279, n.20.

This Court then held the statement in *Stringham* (that the railroad obtained a "limited fee" under the 1875 Act) was "inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation." *Id.* This Court declared, "We therefore do not regard [*Stringham*] as controlling." *Id.* The Court further declared references to *Stringham* in *Choctaw, O. & G. R. Co. v. Mackey*, 256 U.S. 531 (1921), and *Noble v. Oklahoma City*, 297 U.S. 481 (1936), "[to be] dicta based on the *Stringham* case [which is] entitled to no more weight than the statements in that case." *Id.*[15]

This Court found, "[f]ar more persuasive are two cases involving special acts granting rights of way passed after 1871 and rather similar to the general act of 1875." *Id.* (citing *Denver & R.G. Ry. Co. v. Alling*, 99 U.S. 463 (1878) (Harlan, J.), and *Smith v. Townsend*,

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[15] *Choctaw* and *Noble* both involved other congressional acts and railway lines running through Indian lands.

148 U.S. 490 (1893) (Brewer, J.)). Both these cases found the interest granted the railroad to be "a present beneficial easement" and "simply an easement, not fee."

Two points emerge from *Great Northern*. *First*, congressional land-grants to railroads made before 1871 were a "limited fee with a right of reverter." Congressional grants to railroads made after 1871 (and specifically those made under the 1875 Act) were "simply an easement, not a fee." *Id.* *Second*, this Court never lost sight of the distinction between an "easement" and an interest in the "fee estate." This Court consistently used "fee" to refer to a possessory estate as distinguished from an easement, which is a limited right to use the land of another for a specific purpose.

The Tenth Circuit, however, failed to appreciate this Court's analysis in *Great Northern*. And it especially failed to note this Court's disavowal of *Stringham*. The Tenth Circuit said, "the Supreme Court had held as late as 1915 that the right of way granted by the Act of 1875 was neither a mere easement, nor a fee simple absolute, but a 'limited fee' made on an implied condition of reverter in case of nonuse." *Marshall*, 31 F.3d at 1031.

The Tenth Circuit then expressly relied on the repudiated language in *Stringham* for its conclusion, "*Stringham* and other decisions, congressional committeemen in the early 1920's spoke of this retained interest in terms of an 'implied condition of reverter.'" *Id.* at 1032.

It is simply impossible to reconcile the Tenth Circuit's decision in *Marshall* with this Court's holding in *Great Northern*.

While the Tenth Circuit in *Brandt* declared it was compelled to follow its own precedent in *Marshall*, it oddly overlooked its own prior inconsistent precedent in *Chicago & Northwestern Ry. v. Continental Oil, Co.*, 253 F.2d 468 (10th Cir. 1958).

Continental Oil noted precisely the points we just mentioned. To wit:

> *Great Northern*...expressly repudiated the *Stringham* case and those which followed it. In the first place, the court pointed out that the limited fee concept in the *Stringham* case rested upon prior decisions involving pre-1871 legislation, and that *Stringham* failed to heed the "sharp change in Congressional policy with respect to railroad grants after 1871"; and "is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation." The later limited fee cases were dismissed as mere dicta, based on the *Stringham* case.

Id. at 471 (emphasis added).

The Tenth Circuit failed to reconcile its decision in *Brandt* and *Marshall* with its prior contrary holding in *Continental Oil*.

C. Easements do not revert.

Because they are not estates, easements do not "revert." There is nothing to revert. "A reversion is the future estate left in a transferor...when the transfer is of less than the entire estate." WM. STOEBUCK AND DALE WHITMAN, THE LAW OF PROPERTY (3d ed. 2000), p. 83.

An easement is created to serve a particular purpose – here operation of a railroad. The easement terminates when the underlying purpose no longer exists. *See* EASEMENTS AND LICENSES IN LAND § 10.8. "This cessation of purpose doctrine is designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose." *Id.*[16]

The Seventh Circuit noted, "the termination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement." *Samuel C. Johnson*, 649 F.3d at 803 (citing RESTATEMENT (THIRD) OF PROPERTY; Servitudes § 7.4 comments a, c, f (2000)).

The term "reversionary" is sometimes used in a technically incorrect manner as a short-hand label describing the fee owner's right to unencumbered possession of their land when the easement terminates. As the Federal Circuit explained in *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004),

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[16] Citing, *inter alia*, 3 TIFFANY, LAW OF REAL PROPERTY § 817 (3d ed.).

> "[A]s a matter of traditional property law terminology, a termination of the [railroad] easements would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden."[17]

D. The Tenth Circuit's holding is nonsensical because it confuses an easement with a fee estate.

An easement granted a railroad under the 1875 Act is a common law easement and there is no "reversionary" right "impliedly" retained by the United States.

The Tenth Circuit, however, expressly disregarded "any specific category [of property interest] under the rules of real property" and, in so doing, confused an easement with a fee estate. This confusion, in turn, led the Tenth Circuit to wrongly conclude "railroad rights-of-way revert to the United States rather than the adjoining owner."

Because the Tenth Circuit in *Marshall* and *Brandt* chose to eschew the "rules of real property," it is not clear exactly what "interest" it believes the United States held.

On one hand, the Tenth Circuit's holding can be read as saying (at the time of the patent to the Brandt

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[17] *See also Preseault v. United States*, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (*en banc*) (same as *Toews*). This Court similarly used "revert[]" in this shorthand manner. *See Preseault*, 494 U.S. at 8.

family) the United States "impliedly" retained title to the fee estate in land encumbered by the railroad easement, and this fee estate "reverted" to the United States when the railroad easement was subsequently "abandoned." If so, the Tenth Circuit's decision is contrary to this Court's holdings that when a land patent issues, it conveys the *entirety* of the United States interest in the fee estate unless the United States *expressly* retains an interest in the land. *See Boesche, Watt* and *Swendig, supra.*

Alternatively, the Tenth Circuit's holding could be read to say (which is how the decision is written) "railroad rights-of-way revert to the United States." But this reading is contrary to this Court's holding in *Great Northern* that the 1875 Act granted the railroad *only* an easement and is further contrary to the fundamental nature of an easement. To wit: easements do not *revert* to anyone. If the railroad "abandoned" its "interest" (as the Tenth Circuit says), the easement terminated and ceased to exist. There would, thus, be no easement and nothing to "revert" to the United States.

In short, no reading of the Tenth Circuit's decision is consistent with settled principles of property law and this Court's holdings.

III. The Tenth Circuit's decision is also contrary to the common law "strip-and-gore doctrine."

Common law doctrines define rights in land, are the basis of landowners' expectations and understanding of their property interest, and guide courts resolving disputes over land title. The common law was adopted

by the United States and continues to guide determination of land title. *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 879 (1999) (the common law has proved adequate to the task of resolving the resulting conflicts between estates");[18] *Shaw v. Merchants' Nat'l Bank*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.").

Congress *could* have pre-empted common law rules regarding easements, reversions, and other traditional real property interests. But, Congress did not do so. Nothing in the 1875 Act or the Homestead Act of 1862 abdicates common law rules defining an easement granted a railroad as anything other than a common law easement for the limited purpose of operating a railway across a strip of land.

The 1875 Act must be read in light of common law property doctrines. *See Evans v. United States*, 504 U.S. 255, 259-260, 269 (1992) (in the face of "silence" from "the body that is empowered to give us a 'contrary direction' if it does not want the common-law doctrines to survive," the common law applies), and *Smith v. Townsend*, 148 U.S. at 494 (construing a materially identical right-of-way grant and explaining courts look to common law principles before the passage of legislation and the context of the times when construing federal grants).

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[18] *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW (1966), p. 107 (explaining the "dominant concern" of the common law was rights in land).

Among those common law doctrines governing property interests is the "strip-and-gore doctrine" – and the related "centerline-presumption" or "appurtenance doctrine." *See* JAMES KENT, COMMENTARIES ON AMERICAN LAW, Vol. III, Lecture LI (1828), in which he notes:

> The law with respect to public highways, and to fresh water rivers, is the same, and the analogy perfect, as concerns the right to the soil. The owners of the land on each side go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.

Id. at 348.[19]

The Texas Supreme Court (echoing Kent) explained this common law rule of real property in *Mitchell v. Bass*, 26 Tex. 372, 380 (Tex. 1862):

> The established doctrine of the common law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. Such is the legal construction of the grant unless the inference that it was so intended is rebutted by the *express* terms of the grant.

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[19] The strip-and-gore and appurtance doctrine has been a foundational principle of property law since the colonial period. *See City of Boston v. Richardson*, 95 Mass. 146, 146 (1866) ("A record...made between 1639 and 1645, of a possession of a house and lot 'bounded with the street,' shows title in the possessor to the centre of the street, even if the possession was granted by the general court or the town after the street had been laid out.").

The strip-and-gore doctrine presumes that when a grantor conveys title to land adjacent to (or divided by) a narrow strip, the title conveyed includes title to the narrow strip of land unless the deed (or, here, a land patent) expressly reserves to the grantor title to the strip by plain and specific language.

In *Penn Central Corp. v. U.S.R.R. Vest. Corp.*, 955 F.2d 1158 (7th Cir. 1992), Judge Posner applied the concepts underlying this doctrine to find a railroad's interest in a strip of land used for a railway is presumed an easement not a fee estate.[20]

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[20] Beyond the common law doctrine, many states by statute or constitution, expressly limit the interest a railroad can acquire in land across which it builds its railway to only an easement. *See, e.g., Abercrombie v. Simmons*, 81 P. 208, 210-11 (Kan. 1905); *Chouteau v. Mo. Pac. Ry. Co.*, 22 S.W. 458, 460 (Mo. 1893); New York Railroad Act of 1850, (L. 1854, ch. 282, § 17).

> Professor Ely noted:
>
> > Prominent experts took the position that, absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use. "It is certain, in this country, upon general principles," Redfield declared, "that a railway company, by virtue of their compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes." Judicial decisions tended to adopt this line of analysis.
>
> JAMES W. ELY, JR., RAILROAD AND AMERICAN LAW (2001), p. 198 (citing An Act prescribing certain general regulations for the incorporation of rail-road companies, Ch. 118, Laws of Virginia, 1837; SIMEON F. BALDWIN, AMERICAN RAILROAD LAW (1904), p. 77; and quoting REDFIELD, THE LAW OF RAILROADS, Vol. I, p. 255).

Judge Posner explained:

> The presumption is that a deed to a railroad or other right of way company (pipeline company, telephone company, etc.) conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple. Transaction costs are minimized by undivided ownership of a parcel of land, and such ownership is facilitated by the automatic reuniting of divided land once the reason for the division has ceased. If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor – that or the gradual extinction of the railroad's interest through the operation of adverse possession. It is cleaner if the railroad's interest simply terminates upon the abandonment of railroad service. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property – more, that is, than a right of way.

955 F.2d at 1160 (citations omitted).

The public policy identified by Judge Posner is an extension of the common law doctrine disfavoring creation of "strips" or "gores" of land. In *Paine v. Consumers' Forwarding & Storage, Co.* 71 F. 626, 629-30, 632 (6th Cir. 1895) William Howard Taft wrote,

> The existence of "strips or gores" of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are "strips and gores" of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable, and alike vexatious in each of the cases, and that public policy which would seek to prevent this by a construction that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands conveyed applies indifferently, and with equal force, to all of them. It would seem, also, that whatever inference might arise from the presumed intention of the parties against the reservation of the land underlying the water would be as strong in one case as in either of the others....
>
> The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases.

The intent of this doctrine, as Taft explained, is to avoid the "evil" of "valueless" "gores and strips" of land. *Id.* at 632. As Judge Posner noted in *Penn Central*, this

doctrine is premised upon the policy disfavoring the creation of economically unusable skinny strips of land. 955 F.2d at 1160.

Brandt is contrary to the strips-and-gore doctrine. Further, *Brandt* ignored the Tenth Circuit's own strips-and-gores precedent in *United States v. Magnolia Petroleum Co.*, 110 F.2d 212, 217 (10th Cir. 1939):

> It is the general rule that the servient estate in a strip of land set apart for a railroad or highway right-of-way, or for a street, or a small area set apart for school, church, or other public purpose, passes with a conveyance of the fee to the abutting legal subdivision or tract out of which the strip or small area was carved even though no express provision to that effect is contained in the instrument of conveyance, and that on the abandonment of the strip or small area of the purpose for which it was set apart and dedicated the dominant estate becomes extinguished and the entire title and estate vests in the owner of such abutting legal subdivision or tract.

While some segments of abandoned railroad line may be suitable for public recreation or a road, most are not. The United States acquiring title to (or an easement across) these skinny strips will result in the land being taken out of productive use as farm or pasture land and removed from state and municipal

tax rolls. And the United States will not be able to put most of this land to any productive use.[21]

IV. The *Brandt* Court failed to comprehend Congress "shifted" its policy defining land-grants to railroads in 1871.

The Tenth Circuit acknowledged its holding was directly contrary to decisions of the Federal and Seventh Circuits, and Court of Federal Claims. *Brandt*, 496 Fed. App'x at 825. The Tenth Circuit rejected the view of these other courts and looked instead to *Marshall* which was premised on a district court opinion and a law review article.[22]

The Tenth Circuit's deference to a district court decision rather than its own prior contrary precedent in *Continental Oil* and *Magnolia Petroleum* – is more than passing strange, as is the Tenth Circuit's denial of rehearing in light of an acknowledged circuit-split.

The Tenth Circuit relied upon a law review article by Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 U. COLO. L. REV. 85, 150-64 (2011). Mr. Roberts is neither historian nor scholar; he

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[21] By definition, this strip of land has no value as a railroad corridor. In order for the STB to grant the railroad's request to abandon the railroad line, the STB must first find the "present or future public convenience and necessity require or permit the abandonment." 49 U.S.C. § 10903(d).

[22] "Relying upon *Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 207 (D. Idaho 1985), we concluded that the United States retained an implied reversionary interest. *Marshall*, 31 F.3d at 1032." *Brandt*, 496 Fed. App'x at 824.

is (or was) a government lawyer. *See* Roberts, *Legal History* at n.1.

More importantly, his article is premised on a demonstrably false historical premise. As the title suggests, the article contends Congress' 1871 shift in policy concerning land-grants to railroads is a "myth." But, if a "myth," it is a "myth" embraced and affirmed by extraordinarily credible authorities – including this Court.

In *Great Northern*, this Court explained the 1875 Act was the result of a "sharp change in Congressional policy with respect to railroad grants after 1871." 315 U.S. at 275.

Before 1871, Congress made generous grants of the fee estate in publically owned lands (and the minerals under the land) to railroads. Congress sought to encourage railroads to build a transcontinental railway line and provided public land for a right-of-way as well as fee title to alternating tracts of public land the railroad could sell to finance construction of the railway. This Court described the railroad's interest in the right-of-way land under these pre-1871 grants as a "limited fee." *See, e.g.*, *Townsend*, 190 U.S. at 271.

Federal largesse to powerful and politically connected railroads resulted in scandal and public outrage. Congress responded by dramatically changing its land grant policy.

This Court explained Congress's 1871 "shift" in policy:

> Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by

> lavish grants from the public domain. This policy incurred great public disfavor which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:[23]
>
> After 1871 outright grants of public lands to private railroad companies seem to have been discontinued. But, to encourage development of the Western vastnesses, Congress had to grant rights to lay track across the public domain....

Great Northern, 315 U.S. at 273-74.[24]

In the early 1870s, Congress initially passed separate "special acts" for each grant of a right-of-way to a railroad. *Id.* at 274. But passing special legislation for each railroad right-of-way was burdensome, so Congress passed the 1875 Act which was a "general right of way statute" that applied to all railroad rights-of-way across land then owned by the national government. *Id.* at 275.

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[23] "[T]he judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." CONG. GLOBE, 42d Cong., 2d Sess., 1585 (1872).

[24] *See also* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW (2001), pp. 51-64 ("As a consequence [of scandals such as Credit Mobilier], Congress began to shift priorities with respect to the transcontinental project.").

This Court held the 1875 Act granted railroads only a "right of passage" across the land:

> Since *it was a product of the sharp change in Congressional policy* with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches....[Section 4] strongly indicates that *Congress was carrying into effect its changed policy regarding railroad grants.*

Great Northern, 315 U.S. at 275 (footnotes omitted) (emphasis added).

This Court noted the animating objective underlying Congress's shift in policy was that "public lands should be held for the purpose of securing homesteads to actual settlers." *See supra* note 23.

Thus, in the 1870s, there was a "sharp change in Congressional policy with respect to railroad grants." This new policy intended to convey public lands "for the purpose of securing homesteads to actual settlers," and the 1875 Act was adopted as part of this new congressional policy. The property interests of the railroad, the United States, and the homesteaders who actually settled the land must be determined consistent with this policy.

CONCLUSION

The Tenth Circuit's decision in *Brandt* is contrary to this Court's opinion in *Great Northern* and contrary to this Court's admonition in *Leo Sheep*. The Tenth Circuit failed to follow established rules of real property and common law doctrines when determining

title to the Brandt's land. This Court should overturn the Tenth Circuit's ruling.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The National Association of Reversionary Property Owners ("NARPO") is a Washington State non-profit 501(c)(3) educational foundation whose primary purpose is to educate property owners on the defense of their property rights, particularly their ownership of property subject to railroad right-of-way easements. Since its founding in 1989, NARPO has assisted over ten thousand property owners and has been involved in litigation concerning landowners' interests in land subject to active and abandoned railroad right-of-way easements. *See, e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*amicus curiae*); *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998).

This case is important to NARPO because the Tenth Circuit has split from the holdings of the Seventh and Federal Circuits, which (1) unsettles long-established property interests and clouds the title of many landowners whose property was (and is) encumbered by a railroad right-of-way easement established under the General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 492 (codified at 43 U.S.C. §§ 934-939) ("1875 Act"), and (2) will make resolution of title disputes more costly and time-consuming.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation and submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

For more than a century after passage of the 1875 Act, the administrative agency responsible for patenting public lands to private landowners issued patents without reserving any interests in the rights of way granted under the Act. This policy was consistent with the terms of the Act, the intent of Congress, and this Court's precedent, including its unequivocal ruling in *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942): the 1875 Act granted merely easements, not limited fees with an implied condition of reverter.[2]

Accordingly, affirming the Tenth Circuit's decision in *United States v. Brandt*, 496 Fed. App'x 822, 824 (2012), would reverse the historical disposition of the property interests like the ones at issue here—likely in excess of a million acres.

The result would not merely revest ownership in the United States long after it disposed of the lands in question. It would correspondingly divest ownership from thousands of property owners who, for generations, have sold their lands under warranty deeds, unaware of the unstated reversionary rights only relatively recently claimed by the United States.

And in abandoned corridors, strips of farm fields and backyards located throughout the nation would, in the stroke of a pen, be transformed back into public

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[2] NARPO concurs with the analysis and discussion of law presented by Petitioners. To avoid repetition, this brief focuses primarily on the historical disposition of 1875 Act interests and on the only cogent construction of 43 U.S.C. § 912.

lands. Private owners who have built valuable structures on these properties, fenced them off, paid property taxes on them, and possessed them as their own for decades would have their title upended.

The question then is whether this Court, the Department of the Interior, and the historical records for the last part of the 19th century and most of the 20th century all have it wrong. Of course the answer is "no."

First, the *Brandt* decision conflicts with the terms of the 1875 Act, well-settled law concerning the interpretation and sanctity of land patents,[3] and this Court's precedent on the 1875 Act itself. As a result, if *Brandt* is affirmed, such a decision would eviscerate titles that have vested in landowners nationwide. This is true for the owners of hundreds of thousands of acres[4] of former corridors that have already been fully

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[3] (*See* Br. of Pet'rs 31, 36-38.)

[4] All estimates of mileage or acreage in this brief are based on the estimates in *Preseault*. *See* 494 U.S. at 5 ("In 1920, the Nation's railway system reached its peak of 272,000 miles; today [1990] only about 141,000 miles are in use ...."). Because these are estimates, we will assume for ease of reference that roughly 130,000 miles have been abandoned, although "experts predict[ed] that 3,000 miles [would] be abandoned every year through the end of [last] century." *Id*. These right-of-way corridors are composed, in large part, of federal grants of land or of rights of way, including 1875 Act rights of way, interspersed with privately-granted interests. *See Hash v. United States*, No. CV 99–324–S–MHW, 2001 WL 35986188, at *1 & n.1 (D. Idaho Nov. 27, 2001) (1875 Act parcels comprised 60% of the acreage in the corridor, totaling 895

abandoned. It is equally true for the thousands of owners of untold acres of land that are being transformed into linear parks every year pursuant to the National Trails System Act.[5] 16 U.S.C. §§ 1241-51 ("Trails Act").

Second, § 912[6] did not define or alter the 1875 Act grants. Section 912 was enacted almost half a century after the passage of the 1875 Act for the express purpose of disposing of any abandoned railroad interests in which the United States still held title. Further, § 912 facilitated, rather than impeded, the efficient disposal of abandoned strips of land.

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acres); *Idaho v. Or. Short Line R.R. Co.*, 617 F. Supp. 207, 208 (D. Idaho 1985) (1875 Act parcels comprised 82% of acreage in the corridor).

[5] We focus here on the hundreds of thousands of acres of 1875 Act tracts that were abandoned in the 1900s. Additionally, thousands of acres of 1875 Act tracts have been and will be put to recreational trail use. The Federal Circuit and the Court of Federal Claims have repeatedly held that the conversion of 1875 Act easements into linear parks causes a Fifth Amendment taking for which just compensation is due. A thorough review of the issue can be found in *Beres v. United States*, 104 Fed. Cl. 408, 443-57 (2011) ("*Beres II*").

[6] Railroad Right-of-Way Abandonment Act of March 8, 1922, ch. 94, 42 Stat. 414 (codified at 43 U.S.C. § 912) ("Section 912").

ARGUMENT

I. For one hundred and five years, the United States issued land patents subject to 1875 Act easements without reserving unto itself any interest in railroad corridors.

Ultimately at stake here are approximately 1.5 million acres of land,[7] roughly half of which were abandoned in the 1900s. When railroads abandoned these easements, the burden on fee title was extinguished and full rights were restored to the land. Although the United States typically retained certain interests, such as canals and minerals, when it patented public lands to private landowners, patents often made no mention of 1875 Act interests at all. *See Hash v. United States*, 403 F.3d 1308, 1314 (Fed. Cir. 2005) (the land patents from the early 1900s listed reservation of certain rights, including rights of way for ditches or canals, but none mentioned the 1875 Act interests); *Beres v. United States*, 64 Fed. Cl. 403, 413 (2005) ("*Beres I*") (noting in an 1892 patent only water and minerals rights were reserved, but not 1875 Act interests).

In Petitioners' case, the patent expressly retained certain interests, but not the 1875 Act corridor, stating merely the grant was "subject to" the railroad's right of way. This was the practice of the Department of

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[7] Due to the great magnitude of abandonments of railway corridors throughout the 1900s, hundreds of thousands of acres of land, unburdened by these easements, are vested in landowners. The 1.5 million-acre figure is an estimate which includes the acreage of the 140,000 or so miles of corridors that are not abandoned. *See* n.4, *supra*.

Interior[8] from 1875 to mid-1980. *See* 45 Fed. Reg. 44,518 (July 1, 1980) (rescinding earlier regulation which directed that no 1875 Act interests should be retained).

Thus, the United States issued land patents to generations of landowners across the nation without withholding any implied reversionary interests. *See Hash*, 403 F.3d at 1313-18 (1875 Act withheld no reversionary interests nor did land patents); *Beres v. United States*, 104 Fed. Cl. 408, 443-57 (2011) ("*Beres II*") (same); *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483, 485 (2011) (same); *Beres I*, 64 Fed. Cl. at 418 (same); *Brown v. N. Hills Reg'l R.R. Auth.*, 732 N.W.2d 732, 739-40 (S.D. 2007) (same).

In *Great Northern*, this Court noted with approval the DOI's consistent policy of treating the 1875 Act rights of way as easements and issuing land patents without reserving any railroad rights of way whatsoever. 315 U.S. at 275-76. This Court approved of the policy after construing the statute itself and reviewing relevant legislative history, its earlier decisions concerning analogous acts, and the context in which Congress passed the Act. *Id.* at 271-75.

Three main points emerge from this Court's analysis in *Great Northern*, and from the authority upon which it relied, which are applicable here: (1) the 1875 Act granted merely easements, (2) those

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[8] Within the Department of the Interior, the Bureau of Land Management succeeded the General Land Office in administering the disposition of public lands, including issuing land patents. Order 2225 of Sec'y of Dep't of Interior, July 15, 1946. We refer to the agencies collectively as "DOI."

easements remained on the public lands while still in the United States' possession, and (3) fee title to the lands underlying those easements transferred in land patents to the private landowners without reservation. Chronicling the parade of authority as it marches through the decades throws the United States' errant view into stark relief:

- **1875 Act**: "Sec. 4. That any railroad company desiring to secure the benefits of this act, shall ... file with the register of the land office ... a profile of its road; and upon approval thereof ... *thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.*"[9]

- **1878 decision from this Court**: "[W]hen the act was passed, we do not doubt that *the intention of Congress was to grant* to the company *a present beneficial easement* in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the charter of the company, and the act of Congress."[10]

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[9] General Railroad Right-of-Way Act of 1875, § 4, ch. 152, 18 Stat. 492 (emphasis added).

[10] *Railway Co. v. Alling*, 99 U.S. 463, 475 (1878) (emphases added) (construing an analogous act); *see also Great Northern*, 315 U.S. at 279 (citing *Alling* as one of two cases construing materially identical right-of-way statutes and noting *Alling* was "[f]ar more

- **1888 DOI regulation**: "The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right of way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States .... *All persons settling on public lands to which a railroad right of way has attached, take the same* subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases."[11]

- **1891 DOI decision**: "Again it may be stated as a general proposition, that if an easement is granted for a particular purpose, when that purpose ceases to exist, there is an end of the easement .... It is not the fee but the right to use the public lands for railroad purposes which was granted, and, in my opinion, an easement only was intended to pass to the railroad company."[12]

- **1893 decision from this Court**: "Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the

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persuasive" than the later Supreme Court cases, *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44 (1915) and the decisions that followed *Stringham*).

[11] 12 L.D. 423, 428 (Jan. 13, 1888) (emphasis added).

[12] *Pensacola & Louisville R.R. Co.*, 19 Pub. Lands Dec. 386, 387-88 (Nov. 30, 1891) (discussing a materially similar railroad right of way grant in special legislation of June 8, 1872.)

company; and *if ever the use of that right of way was abandoned by the railroad company the easement would cease,* and *the full title to that right of way would vest in the patentee of the land.*"[13]

- **1894 DOI decision**: "That the right of way granted by the act in question is a mere easement can not be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way.'"[14]

- **1895 DOI decision**: "[C]learly ... the estate granted by said act is ... an easement and not the land." Also explaining that no mention or reservation of the right of way in a land patent was necessary because the 1875 Act preserved whatever rights the railroad possessed to the railroad: "The insertion of the right of way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights of any railroad company under said act."[15]

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[13] *Smith v. Townsend*, 148 U.S. 490, 499 (1893) (emphases added) (construing an analogous act); *see Great Northern*, 315 U.S. at 279 (citing *Smith* as the second "[f]ar more persuasive" case to construe the 1875 Act).

[14] *Fremont, Elkhorn & Mo. Valley Ry. Co.*, 19 Pub. Lands Dec. 588, 590 (Dec. 28, 1894).

[15] *Mary G. Arnett*, 20 Pub. Lands Dec. 131, 132-34 (Feb. 23, 1895)

- **1898 DOI regulation**: "The grant made by this act does not convey an estate in fee in the lands used for right of way or station grounds. The grant is merely a right of use for the necessary and legitimate purposes of the roads, the fee remaining in the United States. All persons entering the public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as a part of the area of the tract entered."[16]

- **1903 DOI decision**: "It is well established that the right of way through the public lands granted to railroads ... under [the 1875 Act] is in the nature of a mere easement."[17]

- **1904 DOI regulation**: "The act of March 3, 1875, is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the law, *a reversionary interest remaining in the United States, to be conveyed by it to the person to whom the land may be patented*, whose rights will be subject to those of the grantee of the right of way."[18]

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[16] 27 L.D. 663, 664 (Nov. 4, 1898).

[17] *John W. When*, 32 Pub. Lands Dec. 33, 34 (Mar. 3, 1903).

[18] Regulations Concerning Railroad Right of Way Over the Public Lands, 32 L.D. 481, 482-83 (Feb. 11, 1904) (emphasis added). This Court in *Great Northern* noted the momentary "shift in interpretation" by the Land Department in describing the right as a "base or qualified fee." 315 U.S. at 276. Even so, the regulation plainly stated the "reversionary interest" was to be "conveyed by

- **1906 House Committee Report**: "'*The right* as originally conferred [under the 1875 Act] and as proposed to be protected by this bill *simply grants an easement or use for railroad purposes*. Under the present law whenever the railroad passes through a tract of public land *the entire tract is patented to the settler or entryman, subject only to this easement*.'"[19]

- **1906 and 1909 Acts disposing of forfeited 1875 Act interests**: Forfeiture of "such easement ... *shall*, without need of further assurance or conveyance, *inure to the benefit of any owner or owners of land conveyed by the United States* prior to such date subject to any such grant of right of way or station grounds."[20]

[the United States] to the person to whom the land may be patented." 32 L.D. at 482-83.

[19] *See Great Northern*, 315 U.S. at 277 (emphases added) (quoting H.R. Rep. No. 59-4777, at 2 (1906), a report on an act that confirmed a grant under the 1875 Act to certain railroads).

[20] Act of June 26, 1906, 34 Stat. 482 ("Forfeiture Act of 1906") (emphases added); Act of February 25, 1909, 35 Stat. 647 (codified at 43 U.S.C. § 940) ("Forfeiture Act of 1909") (emphases added). The United States argues these acts support its argument that the interests were reversionary or else there would have been no need for such language. (Br. for U.S. on Pet. for Cert. 14-15.) This is false. The statutes were enacted for the purpose of reclaiming to the United States *forfeited*—i.e., un-built—lines. The language concerning private lands ensured landowners received the interests to which they were already entitled. *See Hash*, 403 F.3d at 1315 (referring to the government's construction as "strained").

- **1909 DOI regulation**: "*Nature of [1875 Act] Grant*. [A railroad company] obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and *such patentee takes the fee, subject only to the railroad company's right of use and possession*."[21]

- **1938 DOI regulation (identical to 1909)**:[22] "*Nature of [1875 Act] Grant*. [A railroad company] obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and *such*

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[21] 43 C.F.R. § 2842(a) (1909) (second emphasis added).

[22] This regulation is post-*Stringham* and preceded *Great Northern*, yet the DOI maintained a clear policy of divesting any interests the United States may have held in 1875 Act rights of way. *See Great Northern*, 315 U.S. at 276, 279 (overruling *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44 (1915)).

patentee takes the fee, subject only to the railroad company's right of use and possession."[23]

- **1942 brief of the United States in *Great Northern***: "[I]t scarcely can be said that the purpose of the 1875 grant will be frustrated if it be construed as conveying an easement rather than a fee. This will merely give to the grant the same meaning which is commonly given to deeds conveying a right of way for railroad purposes."[24]
- **1942 in *Great Northern***: construing the 1875 Act, noting "'[a]pter words to indicate the intent to convey an easement would be difficult to find,'"[25] and rejecting the *Stringham*[26] line of reasoning that the Act granted implied reversionary interests.[27]
- **1957 in *Union Pacific***: "In [*Great Northern*] we noted that a great shift in congressional policy occurred in 1871: that after that period only an easement for railroad purposes was granted."[28]

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[23] 43 C.F.R. § 243.2 (1938) (second emphasis added).

[24] Br. for the United States, *Great N. Ry. Co. v. United States*, No. 149, 1942 WL 54245, at *14 (Jan. 5, 1942).

[25] 315 U.S. at 271 (quoting *MacDonald v. United States*, 119 F.2d 821, 825 (9th Cir. 1941)).

[26] 239 U.S. 44 (1915).

[27] *Great Northern*, 315 U.S. at 276, 279.

[28] *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 119 (1957).

- **1976 DOI regulation (identical to 1909 and 1938)**: "*Nature of [1875 Act] Grant*. [A railroad company] obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and *such patentee takes the fee, subject only to the railroad company's right of use and possession*."[29]

Given the context in which the United States created the 1875 Act grants, it is unremarkable that this Court and the DOI determined they were easements for railroad purposes only, with the underlying fee title passing to patentees. The Act was the "product of a period." *Great Northern*, 315 U.S. at 273. No longer were the exigencies of the Civil War or difficulties with Britain the driving force behind right-of-way grants. *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79-80 (1875) (providing a detailed history of the period leading to land and railroad right-of-way grants). Rather, the period saw a "sharp change" in policy, and Congress resolved that "the public lands should be held for the purpose of securing homesteads to actual settlers." *Great Northern*, 315 U.S. at 275.

For these reasons, this Court overruled its earlier

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[29] 43 C.F.R. § 2842.1(a) (1976) (second emphasis added) (specifying the 1875 Act).

decision in *Stringham* and its progeny on which *Brandt* relied:

> The conclusion [in *Stringham*] that the railroad was the owner of a 'limited fee' was based on cases arising under the land-grant acts passed prior to 1871 and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in [subsequent cases] that the 1875 Act conveyed a limited fee are dicta based on the *Stringham* case and entitled to no more weight than the statements in that case.

Great Northern, 315 U.S. at 279 (citations omitted).

Accordingly, under the overwhelming body of federal authority that controls this analysis, railroads obtained easements restricted to the right to use the land for the purposes for which they were granted and for no other purpose; and in subsequent patents issued to landowners, the United States divested itself of all rights and title to that land.

Only in the last decade or so has the United States argued that it silently withheld this particular stick from the bundle when conveying fee title to patentees. And despite having repeatedly litigated (and lost on)

the issue presented here,[30] the United States has never produced any statutes, DOI decisions, regulations, legislative histories, or land patents that can reasonably be interpreted to show the United States reserved these interests when issuing patents to settlers.

Indeed, in 1942, the United States agreed with Petitioners' position here, arguing that the 1875 Act granted easements no different from common law easements, Br. for the United States, *Great Northern*, No. 149, 1942 WL 54245, at *14, labeling the *Stringham* interpretation "contrary dictum," *id.* at *5, and urging that the DOI's construction of the 1875 Act should not be overturned, *id.* at *20-21 (citations omitted) (DOI's interpretation of the 1875 Act, "especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned.").

As a result of everyone's understanding of the law and as a result of the DOI's policies, hundreds of thousands of acres of former right-of-way lands were long ago abandoned and recorded as private lands.

But in the mid-1980s, one oddly reasoned district court decision started the ball rolling on the road to the Circuit split that led to this case. In *Idaho v. Oregon Short Line Railroad Co.*, the U.S. District Court for the

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[30] *See Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 649 F.3d 799, 803-04 (7th Cir. 2011) ("*S.C. Johnson*"); *Hash*, 403 F.3d at 1313-18; *Schneider v. United States*, No. 8:99-CV-0315, 2008 WL 160921, at *2-3 (D. Neb. Jan. 15, 2008); *Ellamae Phillips*, 99 Fed. Cl. at 485; *Beres II*, 104 Fed. Cl. at 443-57; *Beres I*, 64 Fed. Cl. at 418; *cf. Blendu v. United States*, 75 Fed. Cl. 543 (2007).

District of Idaho surmised that the 1875 Act granted not easements grounded in common law, but rather a different type of easement with implied reversionary properties, which had silently been retained by the federal government and which the State could put to highway use. 617 F. Supp. 207, 208-09 (1985). The court relied in part on precedent which had been expressly discredited by this Court and on a statute enacted in 1922, while essentially marginalizing the terms of the 1875 Act and omitting mention of any relevant land patent that had transferred public land to landowners.

A few other courts have followed *Oregon Short Line* without much additional analysis, including the Ninth Circuit in *Vieux v. East Bay Regional Park District*, 906 F.2d 1330, 1335-36 (1990) (dictum), and the Tenth Circuit in *Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028 (1994), which the Tenth Circuit decided it was compelled to follow in *Brandt*, 496 Fed. App'x at 824-25.[31]

More recently, however, the Federal Circuit and the Seventh Circuit, and the Court of Federal Claims have

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[31] *See also Mauler v. Bayfield Cnty.*, 309 F.3d 997, 1002 (7th Cir. 2002) (dicta); *Barney v. Burlington N. R.R. Co.*, 490 N.W.2d 726 (S.D. 1992). However, both the Seventh Circuit and the Supreme Court of South Dakota have since overruled their earlier decisions on point, concluding that the *Beres* and *Hash* decisions were better reasoned. *S.C. Johnson*, 649 F.3d at 803; *Brown*, 732 N.W.2d at 738-39.

eschewed the line of reasoning in *Oregon Short Line*.[32] These courts instead construed the terms of the 1875 Act, reviewed the terms of the land patents issued by the government to determine whether the United States had retained any interests in the 1875 Act grants, and relied on relevant precedent set by this Court and the DOI. Each court concluded that the railroads acquired mere easements which inured to the benefit of landowners when abandoned.

The circumstances in the Seventh Circuit case exemplify the magnitude of the issue presented here. In *Samuel C. Johnson 1988 Trust v. Bayfield County*, 649 F.3d 799 (7th Cir. 2011) ("*S.C. Johnson*"), the corridor had been abandoned over three decades earlier. *Id.* at 806. Thousands of acres in the corridor had been absorbed into private lands. Nonetheless, Bayfield County claimed the right to turn the nonexistent corridor, which had previously crisscrossed private property, into a trail for ATV and snowmobile use. *Id.* at 802.

Predicated in part on the theory that portions of the corridor had been assembled pursuant to the 1875 Act, the county claimed the interest was an implied reversionary interest held by the United States, which, it alleged, had been preserved in perpetuity since 1980 for the county's use pursuant to § 912 of the Railroad Right-of-Way Abandonment Act of March 8, 1922. *Id.* at 802.

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[32] *See S.C. Johnson*, 649 F.3d at 803-04; *Hash*, 403 F.3d at 1313-18; *Ellamae Phillips*, 99 Fed. Cl. at 485; *Beres II*, 104 Fed. Cl. at 443-57; *Beres I*, 64 Fed. Cl. at 418.

If the Seventh Circuit had agreed—it did not[33]—people who had built improvements on the lands crossed by the former railroad, and who had paid taxes on those lands for several decades, suddenly would have become trespassers on federal property if the Unites States' construction of § 912 were correct.[34]

The circumstances in *S.C. Johnson* are not unique. Since the early 1900s, 130,000 miles of railroad right of way have been abandoned nationwide,[35] and while the government did not tabulate the mileage, history shows that a significant portion of those abandoned corridors were constructed under the 1875 Act.[36]

Thus, more than a century since the 1875 Act was passed and contrary to DOI policy, today a different division of the executive branch—the Department of Justice—is claiming reversionary rights in abandoned tracts of land comprising hundreds of thousands of acres. Likely, the newly-minted DOJ policy stems from an aversion to paying just compensation for the taking of private property when converting railroad easements intended strictly for railroad use into recreational trail

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[33] *S.C. Johnson*, 649 F.3d at 803-04 (holding that property vested in the original settler a few weeks before 1875 Act interests could vest in the railroad, but additionally analyzing the 1875 Act to further hold that even if the railroad got there first, the interest was not reversionary, but rather merely an easement.)

[34] *But see* § II.B, *infra*, discussing how 43 U.S.C. § 912 operated to efficiently dispose of any retained federal interests that had been abandoned by the railroad.

[35] *See* n.4, *supra*.

[36] *See id.*

use.[37] But a 21st-century buyer's remorse should have no influence in the construction of a 19th-century statute, nor should it reverse over one hundred years of the DOI's implementation of the Act. Moreover, the lion's share of the acres at issue were already fully abandoned beyond the reach of the Trails Act in the 1900s.

On much of the land at issue, railroad tracks are long gone; the grades have been leveled and the full widths of the right-of-way footprints are populated by homes, garages, commercial buildings, and other countless improvements. In short, the abandoned corridors are gone both as a legal and historical matter. They are often no longer visible to the naked eye; the lands belong to the landowners.

II. Enacted forty-seven years later for the purpose of efficiently divesting the United States of any interests it might still hold in abandoned rights of way, § 912 neither defined nor altered the terms of the 1875 Act.

Section 912 of the Railroad Right-of-Way Abandonment Act of March 8, 1922 concerned strictly abandoned lands—or lands to be abandoned in the future—in which the United States still held title. The statute was designed to dispose efficiently of federal reversionary interests by transferring them into

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[37] *See* n.30, *supra* (citing Federal Circuit and Court of Federal Claims cases); (*see also* Br. for U.S. on Pet. for Cert. 20 (hazarding that paying just compensation in the Fifth Amendment takings cases "could impose considerable financial liability on the United States and the public fisc.")).

private hands if not dedicated to highway use within one year of the railroad abandonment.[38] There are no terms in the statute which operate to create a retained government interest in 1875 Act rights of way:

> [W]henever public lands of the United States have been ... granted to any railroad company for use as a right of way for its railroad ..., and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon *all right, title, interest, and estate of the United States in said lands* shall [be vested in the owner of the land traversed by the right of way], *except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment* ..., and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever ....

43 U.S.C. § 912 (emphases added).

Contrary to the United States' contention (Br. for U.S. on Pet. for Cert. 2-3, 15), (1) the statute neither defined nor revised the terms of the 1875 Act—it simply does not apply to 1875 Act easements—and (2) for any retained federal interests to which § 912 does apply, the statute operated to *dispose of* abandoned interests, not impede their disposal or block

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[38] (*See* Br. for U.S. on Pet. for Cert. 17.)

their abandonment. *See S.C. Johnson*, 649 F.3d at 805-08 (noting § 912 did not operate to warehouse federal reversionary interests to be claimed by the county (or the United States) a quarter of a century after they were abandoned; § 912 disposed of reversionary interests if not "embraced" by a highway one year after abandonment).[39]

A. Section 912 did not define, revise, or apply to the 1875 Act.

The United States relies heavily on § 912, contending that Congress passed it to affirm that the government retained implied reversionary interests or to otherwise redefine those interests. (Br. for U.S. on Pet. for Cert. 2-3, 15-16.)

Both the Court of Appeals for the Federal Circuit and the Court of Federal Claims have rejected the government's arguments. In *Hash*, Judge Newman found them unavailing:

> The government argues that this supports the position that the government tacitly

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[39] In *S.C. Johnson*, there were two sets of interests at issue, both of which the defendant claimed were reversionary interests. 649 F.3d at 801-04; 804-05. The court ruled that neither of the two were reversionary interests, effectively overruling its earlier decision in *Mauler v. Bayfield County*, 309 F.3d 997 (7th Cir. 2002). *Id.* at 804-05. Nonetheless, the parties had fully briefed the construction of § 912 and the court construed § 912 at great length, perhaps to correct its earlier statements concerning the statute in *Mauler*, and perhaps to contribute in general to the jurisprudence on the statute because it disagreed with the analysis in the lower court and with the analysis and holding in the Ninth Circuit in *Avista Corp. v. Wolfe*, 549 F.3d 1239 (9th Cir. 2008). *Id.* at 806-07.

> intended to retain ownership of the servient estate whenever land patents were granted to lands traversed by a previously granted railway right-of-way. The statute does not support this position. The statute requires the United States to convey any rights it may have, to the patentee of the land traversed by the abandoned right-of-way; it does not say what rights the United States had after the land patent was granted. Indeed, if the United States did have residual rights despite the patented land grant, then the statute required that the rights be conveyed to the private owner. Such an interpretation does not weaken the position of the landowners herein. Neither section 912 nor 913 purported to establish governmental ownership of land that had been granted to homesteaders subject to a right-of-way easement.

403 F.3d at 1317-18.

In *Beres I*, the Court of Federal Claims also disagreed with the government's arguments. As explained by the court,

> [w]hen [§ 912] was passed in 1922, Congress, perhaps in response to confusing and misleading language included in federal court decisions,[40] reconfirmed the absence of such a reversionary interest in the United States and the congressional intent, as indicated in the

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[40] 64 Fed Cl. at 419 ("It would appear that the language of the 1922 Act was intended to address, clarify, and resolve issues created by the imprecise language employed by [*Stringham*] ....").

> legislative history of the 1875 Act, that the land should be reserved for homesteaders ....

64 Fed. Cl. at 428.

Drawing on canons of statutory interpretation, *Beres I* concluded that courts should hesitate to rely on later legislation (and the legislative history of that later legislation) in divining the purpose behind earlier legislation:

> Because legislative goals change over the years, the risk of using subsequent legislation or subsequent legislative history to interpret the intent of an earlier congressional enactment is intuitively obvious. Resort to using subsequent congressional activity of any variety to interpret earlier legislation should be cautiously approached, especially if more direct means are available, such as the clear meaning of the statute. Silence or omission in a statute is an intentional act and can be just as significant as specific statutory direction.

Id. at 416 (citing *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

Here, as to the 1875 Act and § 912, the government is not asking for "a construction of a statute, but, in effect, an enlargement of [both statutes] by the court, so that what was omitted, presumably by inadvertence [under the United States' theory], may be included within its scope. To supply omissions transcends the judicial function." *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

Regardless, § 912 was specifically enacted to *dispose of*, not *retain*, unwanted "strips" of land that were considered "of little or no value" to the government. H.R. Rep. No. 67-217 at 2 (1921); *see also Wyoming v. Andrus*, 602 F.2d 1379, 1384 (10th Cir. 1979); *City of Aberdeen v. Chicago & N.W. Transp. Co.*, 602 F. Supp. 589, 592 (D.S.D. 1984); *Marlow v. Malone*, 734 N.E.2d 195, 198-99 (Ill. App. Ct. 2000); *City of Buckley v. Burlington N. R.R. Corp.*, 723 P.2d 434, 437 (Wash. 1986) ("By making the reversion automatic, Congress obviated the need for the drafting of additional legal instruments by the federal government, or for resolving disputes over each abandoned right-of-way on a case-by-case basis in the courts.").

This purpose does not support a contrary inference that Congress in 1875 intended to retain the interests. It was an afterthought that it might be useful if some railways could be converted to highways within a year of abandonment. H.R. Rep. 67-217 ("attention of the committee was called ... to the fact that in some cases ... it might be desirable to establish highways on [lines that] may be abandoned in the future"). Such an afterthought does not alter the fact that in the first instance these strips were considered "of little or no value," making disposal of these interests the primary objective. *See id.*

Thus, the 1922 legislation—and the modern-day policy objective of converting the abandoned rights of way into recreational trails[41]—cannot support an

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[41] The United States also argues that 16 U.S.C. § 1248(c) (1988) similarly supports construction of the 1875 Act. (Br. for U.S. on Pet. for Cert. 15.)

inference that, in 1875, Congress intended to retain the 1875 Act easements.

B. Section 912 operated to dispose of federal reversionary interests upon abandonment, not warehouse them in perpetuity.

Because *Brandt* and the United States rely heavily on § 912 in their analyses, this Court will be called upon to construe the statute and, in doing so, will likely address the manner in which § 912 operated to dispose of any federal reversionary interests to private owners. This construction will have implications not only for cases similar to this one, but will also have far-reaching consequences for the owners of private property crossed by tens of thousands of miles of rights of way that were abandoned before 1988 and which were subject to § 912.[42] For this reason, we provide an in-depth analysis of how § 912 operated between 1922 and 1988.

The government characterizes § 912 as (1) preventing a railroad from "relinquish[ing]" its "right-of-way" until after "'forfeiture' or 'abandonment' was 'declared or decreed by a court of competent jurisdiction or by Act of Congress,'" and (2) disposing of federal reversionary interests only after that court decree or act of Congress had issued. (Br. for U.S. on Pet. for Cert. 2-3.) Under the DOJ's construction, § 912 completely blocked the railroad from abandoning the interests and impeded the divestment and transfer of

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[42] In 1988, Congress, in a separate statute, modified § 912 so that abandoned rights of way were retained, not disposed, by the government, although the interests could still be "embraced" in a public highway. 16 U.S.C. § 1248(c).

federal reversionary interests until the abandonment was "declared" or "decreed." This construction, however, is nonsensical. It would conflict with the Interstate Commerce Commission's exclusive and plenary power to fully regulate abandonments (as delegated by Congress only two years prior), and it would unravel a century of precedent and practice.

Section 912 sought to dispose of federal interests through a one-year limitations period in which an eligible entity could "embrace" any federally retained interests by dedicating the interest to highway use. If no highway was established within that one-year period, then without "further conveyance or assurance of any kind or nature whatsoever," the interests were to vest in the lands traversed by the right of way. 43 U.S.C. § 912.

For its first six decades, the statute barely made a ripple—only a handful of decisions to address § 912 can be found. *S.C. Johnson*, 649 F.3d at 806. This, during an era when approximately 130,000 miles of right of way were abandoned.[43] If, as the government contends, abandoning a railroad right of way *at any point*—even before 1922—required a court decree or an act of Congress, then the dearth of court decrees or acts of Congress declaring railroads abandoned under § 912 means that, legally, almost all of the tens of thousands of miles of railroad rights of way with federal reversionary interests were never abandoned. The practical implications of this Court adopting the

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[43] *See* n.4, *supra*. By 1988, which is the last year § 912 operated to transfer federal reversionary interests into private ownership, approximately 130,000 miles had been abandoned.

government's interpretation are staggering: railroads could be liable for unpaid property taxes, upkeep, and injuries occurring on their heretofore believed-to-be abandoned rights of way.

These factors are important to a correct understanding of the historical and practical application of § 912 because, whereas historically there appears to have been no controversy, and title was simply reabsorbed by the lands formerly traversed by the easements if not dedicated to highway use within a year, today a split in the courts has emerged on the construction of § 912. Some courts have held that § 912 efficiently disposed of federal reversionary interests, while others have held that § 912 impeded their disposal.

Courts that view § 912 as impeding the disposal of federal interests have varied in their analyses. The district court in *S.C. Johnson* held that an act of Congress or a court decree had to issue before the railroad could abandon its interests at all, so that no interest could revert to the United States to be disposed of by the statute. *Samuel C. Johnson 1988 Trust v. Bayfield County*, 634 F. Supp. 2d 956, 974 (W.D. Wis. 2009) (stating that "in this case, *if* the right-of-way is declared to have been abandoned, it would revert to the United States ....") (emphasis added) (internal quotation omitted), *rev'd by S.C. Johnson*, 649 F.3d at 806-07 (rejecting appellee's argument, which was identical to the district court's holding).

Reasoning somewhat differently, the Ninth Circuit has held that, while the abandonment was not literally blocked by § 912, the one-year limitations period in § 912, in which a municipality could "embrace" the

interests in a public highway, would not begin to run until a court actually decreed the abandonment (or Congress passed a special act). *Avista Corp. v. Wolfe*, 549 F.3d 1239, 1250-51 (9th Cir. 2008). In the meantime, landowners would be vested with "inchoate reversionary rights" until Congress or a court decreed the right of way abandoned or forfeited. *Id.* at 1247.

In practice, neither analysis is workable. The former analysis would block abandonment of the segments of corridors in which the United States retained reversionary interests, even if the Interstate Commerce Commission ("ICC") had authorized abandonment.[44] In other words, § 912 would have silently and impermissibly usurped the ICC's plenary and exclusive role in regulating the abandonment of railroads (which Congress had ceded to the ICC only two years earlier), by purportedly transferring that authority to courts. *See* Transportation Act of 1920, ch. 91, § 402(18)-(22), 41 Stat. 456, 477-478; *Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981) ("Congress granted to the Commission plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessations of service on their lines. And at least as to abandonments, this authority is exclusive.").

The second unworkable analysis of § 912, detailed in *Avista*, at least lets the abandonment take place and "inchoate reversionary interests" to vest in landowners.

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[44] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which took effect on January 1, 1996, abolished the ICC and transferred certain functions and proceedings to the Surface Transportation Board.

549 F.3d at 1247. But it also requires a court decree or act of Congress before the one-year limitations period to establish a highway starts running. *Id.* This construction would mean that a municipality could wait twenty, forty, sixty, or eighty years or longer, after a railroad is abandoned and, if no court decree had been issued, the municipality could go to court and request a decree; and only when the decree issued would the one-year clock to establish a highway begin to run. That is not what the statute says;[45] further, it simply makes no sense.

Common to both decisions was the notion that § 912 mandated prospective-only decrees of abandonment so that interests could only vest after a court or Congress got involved.

However, history makes clear that Congress did not have the above construction in mind when it passed § 912 to dispose of unwanted strips of land that "ought in justice" be given back to the underlying landowner: "Granting such relief in reality gives him only the land covered by the original patent." H.R. Rep. No. 67-217 at 1-2. While the committee did add terms to preserve the strip if a highway was desired, *id.*, municipalities (or any other qualified entities) had one year to "embrace" the interest after abandonment, not countless decades.

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[45] Without acknowledging it was doing so, *Avista* reworded § 912 to make its holding work. Rather than giving municipalities one year from the date of "said [court] decree ***or*** forfeiture or abandonment," the court held that § 912 provided one year from the date of "said decree ***of*** forfeiture or abandonment." *Compare* 549 F.3d at 1243, *with* 549 F.3d at 1247 (emphases added).

The Seventh Circuit reversed the district court and found *Avista* "unpersuasive." *S.C. Johnson*, 649 F.3d at 807. The court found that several factors support the conclusion that the statute did not require a court decree of abandonment before the interests vested in the neighboring landowners.

First, history shows that § 912 did not require courts to issue prospective declarations of abandonment if the ICC had authorized abandonment and the railroad had pulled up its tracks. Once the tracks were gone, out of an abundance of caution, landowners could certainly seek an immediate decree of abandonment to claim their property. But, "this formality has not been observed in rail abandonments." *Id.* at 806. If that formality had been required, with some 130,000 miles of abandoned rights of way during the relevant period, and even if only a small fraction included federal reversionary interests, the courts would have been inundated with requests for declaratory relief. Instead, only a handful of cases can be found. *Id.*

Second, after-the-fact adjudications to determine whether and when an abandonment took place on railroad corridors are and were commonplace—as Congress would have understood in 1922. In other words, history is replete with cases in which a court will weigh the law and facts and "decree" that an abandonment took place back in time. *E.g.*, *Fritsch v. ICC*, 59 F.3d 248, 253 (D.C. Cir. 1995) (1995 ruling that right of way was abandoned in 1993 pursuant to ICC authority and before trail use was instituted); *Pollnow*

v. State Dep't of Natural Res., 276 N.W.2d 738, 746 (Wis. 1979) (holding abandonment occurred in 1973).[46]

As explained by the Seventh Circuit, "[t]he regulator's (the ICC's or STB's) permission to abandon, coupled with the removal of the tracks (abandonment in fact), was sensibly accepted as adequate proof of abandonment .... A formal declaration was necessary only if contrary proof was presented or surprise claimed." *S.C. Johnson*, 649 F.3d at 806 (citing *Keife v. Logan*, 75 P.3d 357, 358 (Nev. 2003) (per curiam) (affirming an *ex post facto* decree of abandonment in finding interests had vested under § 912)).

Third, this practice would not result in unfair surprise or "arbitrary forfeitures of property rights," as had been held in *Avista*, because the ICC process of abandonment—which required notice be given to local governments—coupled with the pulling up of tracks, would give municipalities ample notice of any abandonment, and they had a one-year statutory period after the tracks were pulled up in which to act. *Id.* at 807 (citing *Avista*, 549 F.3d at 1250).

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[46] *See also Clemmer v. Rowan Water, Inc.*, No. 0:04-CV-165 HRW, 2006 WL 449266, at *1 (E.D. Ky. Feb. 23, 2006) (holding right of way abandoned and interests vested in 1985-86); *Petrus v. Nature Conservancy*, 957 S.W.2d 688, 688-89 (Ark. 1997) (affirming abandonment in 1985); *Forwood v. Delmarva Power & Light Co.*, No. CIV.-A.-10948, 1998 WL 136572, at *5 (Del. Ch. Mar. 16, 1998) (decreeing railroad abandoned in the mid-1970s); *Dowd v. City of Omaha, Douglas Cnty.*, 520 N.W.2d 549, 553 (Neb. Ct. App. 1994) (approving 1988 finding of abandonment in 1981).

Fourth, to the extent there would be any concern that the right of way was not actually abandoned, the court was

> ... supported in thinking a prospective judicial declaration of abandonment unnecessary not by a literal reading of section 912 (which isn't possible, because "decree or forfeiture or abandonment" is a garble) but by reflection on how onerous the process for obtaining regulatory authorization to abandon a rail line is, *see* 49 C.F.R. §§ 1152.1 *et seq.*, and how even if authorization is obtained the railroad still must run the gauntlet of judicial review in order to be allowed to abandon a line. A railroad is hardly likely to incur the expense of abandonment proceedings if it doesn't intend to abandon the rail line if given permission to do so—and promptly too, as authority to abandon expires after a year.

Id. (citations omitted).

Fifth, "[w]hen the rare case arises in which there is a dispute over whether a right of way has been abandoned, a claimant who doubts that it has been can sue; but he cannot just claim that the absence of a formal prospective declaration in a judicial opinion or Act of Congress means that the right of way never was abandoned." *Id.* at 808.

The Seventh Circuit's construction of § 912 makes far greater sense than the Ninth Circuit's in *Avista* or the district court's in *S.C. Johnson*: a "literal reading" of § 912—the terms of which are "a garble"—*might* suggest that only after a court decree or act of Congress

could the interest even be abandoned—but this is a "nonsensical" construction. *See id.* at 806. Congress in 1922 would have known that decrees of railway abandonments were always made after the fact. This would not have been considered an impermissible retroactive declaration, but rather the way our courts have always adjudicated and resolved disputes over railway abandonments.

The contrary construction argued by the United States—that § 912 mandated prospective decrees *before* interests could even be abandoned, let alone vest in landowners—(1) would result in tens of thousands of miles of rights of way *not* being abandoned and (2) would have required landowners along those tens of thousands of miles to flood the courts seeking judicial decrees in order to give effect to § 912. When examined through the lens of practical reality, the government's construction is nonsensical.

CONCLUSION

In *Great Northern*, at the urging of the United States, this Court fully endorsed the DOI practice of transferring fee title in a patent to the landowner without reserving any interest in the tracts comprising the 1875 Act grants. This Court so found because the 1875 Act granted merely easements. As a result of the DOI's policy, generations of land patents have issued without the reservation the United States now claims. No matter how compelling modern-day policies favoring the preservation of rights of way may be, a reversal of *Great Northern* would upend decades of justified reliance on established principles of land ownership for over a million acres of land. The Tenth Circuit's decision should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1173

IN THE

Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the amici made a monetary contribution to its preparation (Rule 37.6).

state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning—including physical, economic, and community planning—at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public's well being today, as well as to the well being of future generations, by developing sustainable and healthy communities and environments. The APA has 47 regional chapters and represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues, nationwide.

This case on its face involves whether there is a retained federal interest in the General Railroad Right of Way Act of 1875, 43 U.S.C. §§ 934-39 (1875 Act), sufficient for application of 43 U.S.C. § 912, as modified by 16 U.S.C. § 1248(c), to sustain a U.S. Forest Service trail where it traverses an inholding on an 1875 Act federally granted railroad right of way (FGROW). But the issue as framed by Petitioners has far broader implications. Petitioners argue that 43 U.S.C. § 912 does not apply to 1875 Act FGROW. State and local governments have long relied upon 43 U.S.C. § 912 and two related statutes, 43 U.S.C. § 913 and 23 U.S.C. § 316, for the location of public streets and highways in and across FGROW. In addition, prior to

the National Trails System Improvements Act of 1988, 16 U.S.C. § 1248(c)-(g), 43 U.S.C. § 912 provided that all FGROW upon judicially determined actual abandonment would belong to towns and cities within municipal limits. So, prior to 1988, towns and cities depended upon section 912 for their title within municipal limits for federally granted rail corridor for general purposes. This raises significant reliance and expectation issues, should the statute be ruled inapplicable to 1875 Act rights of way, as argued by Petitioners.

Amici have an interest in preserving state and local transportation systems and municipal development, long dependent upon application of 43 U.S.C. § 912 to 1875 Act FGROW. *Amici* accordingly support the position of the Respondent that 43 U.S.C. § 912 applies to FGROW granted pursuant to the 1875 Act, and that the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

SUMMARY OF ARGUMENT

State and local governments have long relied upon application of 43 U.S.C. § 912 to FGROW, including 1875 Act FGROW, to secure title to public highways in and across FGROW. Petitioners' claim that section 912 does not apply to 1875 Act FGROW ignores the reasonable reliance on the dispositional regime provided by that section. 1875 Act FGROW, like other FGROW, is established and governed by federal, not state, law. Petitioners' contention that the 1875 Act represents a policy shift by Congress making 1875 Act FGROW different from prior FGROW is not supported by statutory language or directly relevant legislative history. Moreover, but for 43 U.S.C. § 912, the 1875 Act right of way at issue here would not terminate, for

there is no other statute governing its forfeiture. In that event, the Petitioners would still not receive possession or use of the surface estate in the 1875 Act right of way they claim.

ARGUMENT

I. State and Local Governments Have Long Relied upon 43 U.S.C. § 912 to Control Disposition of the Surface Estate in 1875 Act Federal Rights of Way.

State and local governments are interested in preserving 43 U.S.C. § 912 to secure local and state governments title to their highways inside federally granted railroad rights of way. Since federal rights of way cannot be occupied by state or local highways but for 43 U.S.C. § 912 and § 913 (and 23 U.S.C. § 316), and since state and local governments have long relied (implicitly or explicitly) on these statutes for their highway uses inside federal rail corridors, the construction of these statutes advocated by Petitioners not to apply to 1875 Act rights of way is a considerable novation, and rather alarming in light of past reliance. This concern applies not only to trails established by state and local governments on FGROW, but to all manner of public highways.

43 U.S.C. § 912, applicable to 1875 Act FGROW, so-called "charter" FGROW of the Civil War era, and to pre-Civil War FGROW represents an instance of constructive federalism. No one knows better than state and local governments how difficult is the task of assembling or expanding transportation rights of way in the United States, nor how troubling the loss of such

facilities.[2] For this reason, state and local governments have long viewed existing transportation corridors as a kind of natural resource, worthy of preservation for current as well as future needs.[3]

Consistent with this recognition, section 912 since its adoption in 1922 has allowed state and local governments reliably to use all FGROW, regardless of the era of its grant, for public highway purposes. Many state and local governments have relied on section 912 to establish public highways or segments of highways, on FGROW. That reliance is entitled to greater protection than mere private property rights because these lands are infused with a public trust for transportation and communications uses.

In addition, prior to the National Trails System Improvements Act of 1988, 16 U.S.C. §§ 1241-1251, 43 U.S.C. § 912 provided that local governments obtained title to all federal rights of way within municipal limits in the event no public highway was established within the FGROW within one year of a judicial declaration of abandonment. Thus, under 43 U.S.C. § 912, municipalities traversed by federal rights of way—200 feet wide in the case of the 1875 Act, and up to 400 feet wide in the case of some of the "charter" railroad rights of way—have obtained title for all manner of

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[2] "To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built." *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973).

[3] *See also Preseault v. ICC*, 494 U.S. 1, 19 (1990) ("Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use is foreseeable").

development projects. It is a very late date to upset these old dispositions.

II. Congress Intended 1875 Act Rights of Way to Embody the Same Federal Interest as Charter Rights of Way.

In this case there is no question that the FGROW has priority over Petitioner Brandt. Brandt admitted below that the original railroad in this case (Laramie, Hahn's Peak, and Pacific Railway Co.) obtained its 1875 Act right of way "about 1908." Pet'rs' 10th Cir. Br. 4. The right of way clearly vested in the railroad long before Petitioners' predecessor in interest obtained the patent (Feb. 18, 1976) under which Petitioners now asserts their claim. Thus, if there is a federal interest in the right of way, that interest retains its priority over any interest asserted by Petitioners.

Petitioners' argument necessarily rests on the premise that an 1875 Act FGROW is a mere easement which, like any other state law rail easement, extinguished under state law upon the relevant railroad's consummation of the pertinent Surface Transportation Board (STB) abandonment authorization in January of 2004. Conceding that circumstances are different for pre-1875 Act FGROW (which Petitioners regards as fee in nature),[4] Petitioners argue that 43 U.S.C. § 912 simply has no application to 1875 Act FGROW, because 1875 Act FGROW are the equivalent of state common law

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[4] *See* Pet'r's Br. 49-52, arguing that pre-1871 right of way grants conveyed a limited fee.

easements that disappear upon termination of STB jurisdiction.[5]

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[5] Until recently, the circuits were in agreement on the applicability of 43 U.S.C. § 912 to FGROW. Most FGROW occurs in the Ninth and Tenth Circuits. The Tenth Circuit has consistently held that 43 U.S.C. § 912 applies to 1875 Act rights of way. *E.g.*, *Marshall v. Chicago & N.W. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994), *affirming*, 826 F. Supp. 1310 (D. Wyo. 1992); *Phillips Co. v. Denver & Rio Grande Western R.R. Co.*, 97 F.3d 1375 (10th Cir. 1996), *cert. denied*, 521 U.S. 1104 (1996); *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1236 (10th Cir. 2006). The Ninth Circuit appears to be in accord with the Tenth Circuit. In *State of Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985) the court held that 43 U.S.C. § 912 necessarily applied to 1875 Act FGROW and found that the United States retained an interest. The Ninth Circuit has affirmed the applicability of section 912 to so-called charter railroad grants basically for the same reasons assigned by the district court for applying section 912 to 1875 Act rights of way. *E.g.*, *Vieux v. East Bay Regional Park District*, 906 F.2d 1330 (9th Cir. 1990) (charter grants); *Avista Corp. v. Wolfe*, 549 F.3d 1239 (9th Cir. 2008) (same). *See also King County v. Burlington Northern R.R. Co.*, 885 F. Supp. 1419 (W.D. Wash. 1998) (section 912 applied to a Northern Pacific federal right of way). The Seventh Circuit originally held that FGROW conveyed a limited fee subject to a reverter, *United States v. Illinois Central*, 89 F. Supp. 17 (E.D. Ill. 1949), *aff'd on the basis of opinion below*, 187 F.2d 374 (7th Cir. 1951) (pre-Civil War grant) and applied section 912 to FGROW. *See Mauler v. Bayfield County*, 204 F. Supp. 2d 1168 (W.D. Wis. 2001), *aff'd*, 309 F.3d 997 (7th Cir. 2002) (pre-Civil War grant). Based on Federal Circuit precedent in cases like *Hash v. United States*, 403 F.3d 1308 (2005) (ruling that federal rights of way were mere easements for purposes of Tucker Act claims arising from STB's application of the federal "railbanking" statute, 16 U.S.C. § 1247(d), to them, the Seventh Circuit more recently ruled the opposite. *Samuel C. Johnson 1988 Trust v. Bayfield County*, 634 F. Supp. 2d 956 (W.D. Wis. 2009), *rev'd*, 649 F.3d 799 (7th Cir. 2011) (no application to same pre-Civil War grant). (Petitioners treat *Samuel C. Johnson* as involving the 1875 Act, but the railroad right of way there in

But if pre-1875 Act FGROW is different from the 1875 Act FGROW in terms of application of 43 U.S.C. § 912, then the reason must lie in the language used to grant the FGROW, or if the language is essentially the same, then in the intent of Congress.

> It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of common law, which are properly applicable only to transfers between private parties. *Missouri, K. & T. Ry. v. Kansas Pac. Ry.*, 97 U.S. 491, 497 (1878). *Accord Leo Sheep Co. v. United States*, 570 F.2d 881, 885 (10th Cir. 1977), *rev'd on other grounds*, 440 U.S. 668 (1979). ("[i]n order to determine whether there was an implied reservation of an easement of access, we look solely to the intent of Congress, as such will not be defeated by application of the rules of common law").

The basis of all of Petitioners' arguments for treating 1875 Act FGROW as "easements" rest on the notion that there was a major policy shift relating to FGROW at or shortly prior to the 1875 Act. This is a red herring. Although there was a policy shift away from providing grants in aid of construction (in the form of federal bonds or grants of every other section out to a specified distance) commencing in 1871, there was no shift in terms of grants of rights of way. To

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dispute involved pre-Civil War statutes.) *See also* Danaya Wright, *Federal Control of FGROW Reverter Interests*, in POWELL ON REAL PROPERTY 78A15 (Michael Allan Wolf ed., 2012).

determine the intent of Congress, courts ordinarily look to the language of the statute and to its legislative history if the language is ambiguous, or even to determine if there is a policy shift that is germane. As shown below, on examination, there is no significant change in statutory language and nothing in the legislative history that supports Petitioners.

A. The right of way grants remained basically the same through 1875.

Congress adopted its first FGROW statute in 1835.[6] For the next 17 years, Congress acted upon individual requests to provide federal rights of way to particular railroads. The most significant innovation during this period came in 1850. Congress provided not only a FGROW for the Illinois Central (and several associated railroads) from Mobile to Chicago, but also, for the first time, a grant in aid of construction, in the form of every alternate even section of land in a six mile strip on each side of the road.[7]

Because of the burden of having to pass numerous individual federal grants (and to permit state chartered railroads to obtain a FGROW without specific action by Congress), Congress adopted a general right of way statute applicable both to railroads and other roads across federal lands in 1852.[8] Interestingly, the granting language used for

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[6] *See generally* THOMAS ROOT, RAILROAD LAND GRANTS FROM CANALS TO TRANSCONTINENTALS (1986); Danaya Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History:* Hash v. United States *and the Threat to Rail-Trail Conversions*, 38 ENV. L. 711 (2008).

[7] Act of Sept. 20, 1850, 9 Stat. 466.

[8] Act of Aug. 4, 1852, 10 Stat. 28. The 1852 Act was applicable for roads "begun within ten years from and after passage of this

the FGROW in both the 1850 Illinois Central statute and the 1852 general right of way statute was essentially identical: a "right of way through public lands" in the case of the Illinois Central grant,[9] and a "right of way . . . over and through any of the public lands of the United States. . . ." in the case of the 1852 Act.[10] Congress also adopted numerous statutes providing alternate sections of land as grants in aid of construction for individual railroads subsequent to the adoption of the 1852 Act.[11]

This situation continued with the numerous so-called "Pacific Railroad" (or "charter" railroad) grants commencing with the Civil War. Thus, in addition to granting substantial aids in construction (alternate sections of land as well as access to federal bonds) to Union Pacific and other railroads for the first great transcontinental railroad, section 2 of the Act of July 1, 1862, 12 Stat. 491, granted "the right of way through the public lands . . . for construction of said railroad and telegraph line. . . ." The subsequent "charter" railroad grants all contained similar right of way language, all the way through the last of the charter railroads (the Texas Pacific) established by the

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Act. . . " Congress extended the Act to all territories by the Act of Mar. 3, 1855, 10 Stat. 686, and subsequently extended its applicability for an additional five years from August 4, 1862. Act of July 15, 1862, 12 Stat. 577.

[9] Act of Sept. 20, 1850, 9 Stat. 466.

[10] Act of Aug. 4, 1852, 10 Stat. 28.

[11] Act of July 15, 1862, 12 Stat. 577. *E.g.*, Act of May 17, 1856, 11 Stat. 15 (for railroads in Florida and Alabama); Act of June 3, 1856, 11 Stat. 17 (Alabama); Act of June 3, 1856, 11 Stat. 18 (Louisiana); Act of June 3, 1856, 11 Stat. 20 (Wisconsin); Act of June 3, 1856, 11 Stat. 21 (Michigan).

Act of March 3, 1871.[12] Early Supreme Court decisions treated the FGROW as fee in nature. *E.g., St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426 (1880).[13]

Between 1871 and 1875, Congress adopted at least 15 more statutes for specific railroads, but because of scandals relating to diversion of the "aids in construction" by management of some of the charter railroads, and because of opposition to the vast withdrawals of public lands from settlement that occurred in order to reserve checkerboard lands for the railroads, Congress granted only rights of way across the public lands. *See Great Northern Railway Co. v. United States*, 315 U.S. 262, 274 n.9 (1942).

In 1875, Congress returned to a regime similar to the 1852 Act, thus relieving itself of the necessity of acting upon specific requests for FGROW. In particular, Congress adopted the General Railroad Right of Way Act of 1875, codified at 43 U.S.C. §§ 934-39. That statute did not provide any "aids in construction" (alternate sections or federal bonds), but broadly granted "[t]he right of way through the public lands . . . to any railroad company . . . ." The granting language for the right of way under the 1875 Act was essentially the same as the granting language for the right of way under the Pacific Railroad ("charter") railroad right of way grants.[14] The 1875 Act even

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[12] Section 7 of the Act of March 3, 1871, 16 Stat 576, grants "the right of way through public lands . . for the construction of said railroad and telegraph line . . . ."

[13] *See* Wright, *supra* note 5, 78A.09.

[14] The 1875 Act covers lines actually constructed prior to its adoption, so long as the railroad in question filed its articles of incorporation, proof of construction, and a profile map after passage of the Act in accordance with Department of Interior

adopted the same eminent domain language as for the transcontinentals. 43 U.S.C. § 936.

Since the language of the various FGROW grants is basically the same that leaves the legislative history as the sole source on which a court might attempt to distinguish 1875 Act FGROW from those previously granted. No court that has yet ruled on the subject has addressed the relevant legislative history of the 1875 Act, and there is no indication that any litigant (or *amicus*) has yet either, until now.[15]

B. The relevant legislative history of the 1875 Act confirms that Congress intended no change in the nature of the right of way grant.

Contrary to the arguments of the Petitioners and their *amici*, the legislative history of the 1875 Act shows that the right of way interest granted under the 1875 Act is more than a state law easement, and instead is what FGROW have always been. More

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procedures. *Boise Cascade Corp. v. Union Pac. R.R. Co.*, 630 F.2d 720, 723 (10th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981).

[15] Darwin Roberts demonstrates in *The Legal History of Federal Granted Railroad Rights of Way and the Myth of Congress's "1871 Shift,"* 8 COLO L. REV. 1, 14 (2011) that no litigant brought any relevant legislative history to the attention of the Supreme Court in *Great Northern v. United States*, 315 U.S. 262 (1942), on which Petitioners heavily rely, and all the other cases on which Petitioners relies. Mr. Roberts indicates that instead the Solicitor General in his brief claimed there was a policy shift between 1871 and 1875, as there was in respect to grants in aid of rail construction. Without a logical basis or legislative history, he suggested to the Supreme Court that this amounted to a change as to the right of way grants themselves. The Seventh Circuit evidently was aware of Mr. Robert's article in *Samuel L. Johnson*, 649 F.3d 799.

specifically, Congress rejected the construction that Petitioners advocate.

During floor debate on the bill from the House Committee on Public Lands, Congressmen Holman and Hoar, both opponents of subsidies for railroads, each offered floor amendments enhancing the power of states in connection with 1875 Act rights of way. Congressman Hoar's proposal is the more relevant. Congressman Hoar acknowledged prior court decisions construing FGROW to reserve a property interest in the United States sufficient to defeat state law even if the United States later parts with all its public lands in the vicinity. He explained that he wished to alter that situation for the rights of way to be granted under the legislation that became the 1875 Act:

> "what would be the condition of the road-bed? It is a tract of land owned by the United States, over which a railroad under the authority of the United States passes. Now, if the State undertakes to meddle with that location, it is meddling with lands within its limit the property of the United States, and with a right of way within its limits granted by the United States. The United States may in the course of years or generations have parted with all its public lands in the State or in the vicinity of the road, and still, whenever the State undertakes to exercise the ordinary local authority of permitting a highway across the track of the road, or a bridge to be built over it, or requiring the railroad in a populous city to move its tracks from a street in the central part of the city to the outskirts, or another of those acts which State authorities exercise, *the railroad will meet the State with the constitutional objection that this*

> *land you are dealing with is the property of the United States*; the eminent domain did not come from your State to us as in ordinary cases, and the right of way with which we are clothed was given by the United States. In that case the people of the State would either have to come to Congress for a remedy or be without it."

Congressman Townsend, the floor manager for the bill, responded:

> "Is not that the condition in which the Union Pacific Railroad stands in Kansas and has stood, and in California too?"

Congressman Hoar replied:

> "Undoubtedly; and I desire to say, as my friend puts the question, that I regard as a most lamentable fact in our history the carelessness with which between 1863 and 1865, or 1870, Congress dealt with the great function of incorporating these great highways . . . . I think one of the most distressing facts in our history is the example of carelessness and fraud which was set in the organization of these roads.
>
> And now if my friend will permit me I will read the amendment which I propose to offer:
>
> > *Provided, All such rights of way shall be subject to the authority of any State hereafter formed through which such road shall pass, as if the land occupied by such way had been originally granted by such State.*
>
> There can be no objection to that."

Congressman Townsend then stated: "I accept the amendment." 3 CONG. REC. 406 (Jan. 12, 1875) (emphasis added). After a debate on Congressman

Holman's floor amendment,[16] Congressman Hoar's amendment was adopted by the House. *Id.* at 407.

Had Congressman Hoar's amendment gone into law, it would have made 1875 Act rights of way nothing more than state law easements, controlled by state law, with no retained federal interest. But Congressman Hoar's amendment did *not* become law. The Conference Committee report deleted both the Holman and Hoar amendments. Congressmen Hoar and Holman strenuously objected, with Congressman Holman accusing the leadership of attempting to perpetrate "a fraud on the House." The House nonetheless accepted the conference report. *See* CONG. REC. 2217-18 (Mar. 3, 1875). The President signed the bill into law on the same day. *Id.* at 2210.

The only inference that this history allows is that Congress intended 1875 Act FGROW to be regarded exactly like other FGROW; that is, in the words of Congressman Hoar, as "property of the United States." This is consonant with the actual granting language in 43 U.S.C. § 934, which, as already demonstrated, is essentially identical to prior right of way granting statutes. When Congress knows the law, as manifest in the floor debates, and enacts language previously construed to create a federal interest, then it must be deemed to have adopted that interpretation. *See Canon v. University of Chicago*, 441 U.S. 696-98 (1979); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

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[16] Congressman Holman's amendment would have allowed states to regulate interstate commerce on the 1875 Act rights of way. Congressman Holman was forced to agree to limit state regulatory power to intrastate commerce. 3 CONG. REC. 406-07 (Jan. 12, 1875).

See generally 2B SUTHERLAND STATUTORY CONSTRUCTION § 49:8 (7th ed. 2013).

Petitioners assert that nothing in the 1875 Act suggests it is granting "anything but common law easements" but the truth is quite to the contrary. Petitioners would have this Court do what Congress rejected. This legislative history is hardly consistent with a claim of a policy shift sufficient to change the nature of the right of way into that which Congress rejected. This should not be surprising. Congress opted for a uniform federal policy with respect to FGROW.

During the interval between adoption of the 1875 Act and Congress's adoption of 43 U.S.C. § 912, Supreme Court decisions contend to construe the scope of FGROW broadly, to provide exclusive possession and use of the surface to the railroad, to forbid alienation of the surface, and to exist until an act of forfeiture was adopted by Congress. In *New Mexico v. United States Trust Co.*, 172 U.S. 171, 181 (1898), this Court treated a pre-1875 Act FGROW as fee in nature. In *Northern Pacific R.R. v. Townsend*, 190 U.S. 267 (1903), also involving a pre-1875 Act federal corridor, this Court ruled that although state law adverse possession is ordinarily applicable to parcels held in fee, a federal grant had an implied condition of reverter keeping the entire grant intact for railroad purposes. The Court described the FGROW held by the railroad as a "limited fee, made on condition of reverter [to the United States] in the event that the company ceased to use or retain the land for the purpose that was granted." 190 U.S. at 271. This Court reasoned that the railroad could neither voluntarily nor involuntarily transfer the

FGROW to another for a purpose other than that for which the right of way was granted. *Id.*[17]

The Supreme Court in *Rio Grande Western v. Stringham*, 239 U.S. 44 (1915), consonant with the relevant legislative history, treated 1875 Act right of way the same as other federal rights of way: as a base (or limited) fee subject to a reverter to the United States. As a limited fee, the property was withdrawn from the public domain for purposes of subsequent patents to the legal subdivision traversed by the right of way. Under this construction, which comports with the language of the statute and the relevant legislative history, Petitioners' predecessor in interest never had an interest in the FGROW parcel Petitioner now claims.

C. 43 U.S.C. § 912 and § 913 confirm Congress's intent.

Congressman Hoar's objection to FGROW in the debate on the 1875 Act included three elements: he complained that state and local highways could not be built across it, that eminent domain was impossible, and that it got in the way of urban development, essentially forever. As cases like *H.A. & L.D. Holland Co. v. Northern Pac. Ry. Co.*, 214 F. 920 (9th Cir. 1914), holding that FGROW were exclusive confirm, he had a point. As the West and Midwest (where most FGROW are located) continued to grow, Congress finally turned its attention to the federal interest in FGROW commencing in 1920.

Petitioners and their *amici* make much of conflicting interpretations of the nature of FGROW by the

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[17] *See, e.g., The Richardson Real Estate Mining Commercial Corp. v. Southern Pacific Co.*, 260 P. 195 (Ariz. 1927) (similar).

Department of the Interior. But the Interior Secretary told Congress when 43 U.S.C. § 912 was adopted, referencing *Townsend* and *Stringham*, that the railroads obtained a base fee with an implied condition of reverter. Specifically the Secretary said: "It follows . . . that upon abandonment . . . legal title to the land included in such [FGROW] reverts to and becomes the property of the United States and does not pass to any patentee . . . to whom patents were issued [for the legal subdivision traversed]." S. REP. NO. 388, at 2 (1922); H.R. REP. NO. 217, at 2 (1921). The relevant congressional committees explicitly adopted this construction in framing section 912. *See* S. REP. NO. 388, at 1-2, and H.R. REP. NO. 217, at 1-2. This Court's decisions were discussed on the House floor. *E.g.*, CONG. REC. H6473-74, H8046-47 (1920) (statement of Rep. Christopherson). The Secretary of Interior also informed Congress that title to the right of way should not vest in any subsequent party after abandonment until there was an Act of Congress finding forefeiture or a judicial declaration of abandonment, in order "to avoid confusion, controversies, and litigation." H.R. REP. NO. 851, at 2 (1920). Recognizing that FGROW on abandonment "makes a very good foundation for a public highway," and "realizing that highways were of public importance," Congress expressly prioritized public highway uses in FGROW. *E.g.*, CONG. REC. H4496-97 (1921).

When Congress, aware of a Supreme Court case, adopts legislation effectively incorporating this Court's interpretation, the action constitutes a ratification of the interpretation, not a repeal of it. *See Georgia v. United States*, 411 U.S. 526, 532-33 (1973) (re-enacting Congress presumed to adopt interpretation where aware of it). Congress neither disavowed *Townsend* and *Stringham*, nor otherwise

said that federal rights of way should be treated as state law easements. Instead, Congress responded by addressing the problem which motivated Congressman Hoar in the first place: Congress provided that state and local governments could use federal rights of way for public highways, and that municipalities could obtain those rights of way upon judicial declaration of abandonment for urban development.

In particular, rather than overruling court decisions indicating that the railroad in the surface state was in the nature of a base fee subject to reverter. Congress in 1920 adopted 43 U.S.C. § 913, allowing co-location of public highways on FGROW,[18] and in 1922 adopted 43 U.S.C. § 912, which was intended to be applicable to the final disposition of all FGROW upon reverter.

D. The alleged policy change in the 1870's did not occur.

Petitioners' argument about a policy shift in the 1875 Act such that FGROW is now some kind of state law easement does not appear to take into account relevant legislative history. In *Great Northern v. United States*, 315 U.S. 262 (1942), the United States sought to enjoin the railroad from drilling for or removing oil and gas under an 1875 Act right of way. The Solicitor General argued that there had been a major policy shift in 1871 such that 1875 Act rights of way were really easements rather than fees, and that

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[18] 43 U.S.C. § 913, permitted state and local governments to use FGROW for public highways so long as a width fifty feet on each side of the centerline was preserved for rail. This authorization was later expanded to the entire federal corridor in 23 U.S.C. § 316 to ensure authorization of crossings and streets and highways in more cramped quarters.

Stringham was thus wrongly decided. This Court found for the United States, accepting the Solicitor General's contention about a policy shift, and stated that 1875 Act rights of way were easement in nature—at least so as not to convey the mineral estate in a right of way to the railroad. There is no indication that the Court either was offered any of the 1875 Act legislative history or was apprised of Congress's ratification of *Stringham* in the process of adopting 43 U.S.C. § 912 and § 913.[19]

In *United States v. Union Pacific*, 353 U.S. 112 (1957), the issue again was whether the United States owned the mineral estate, this time associated with a "charter" railroad grant. This Court held that the exception of mineral lands in section 3 of the Pacific Railroad Act of 1862 for grant in aid sections also applied to the right of way grant itself. The majority reasoned that the railroad's interest was in the nature of an easement, so that the United States retained the mineral estate. In dissent, Justice Frankfurter accused the majority of ignoring the major change in policy that supposedly occurred in the 1870's. 353 U.S. at 128. Again, neither the majority nor the dissent appeared aware of 43 U.S.C. § 912 or the relevant legislative history.

There was a shift in policy beginning in 1871 away from grants in aid of construction, but (as Congressman Hoar underscored) it had nothing to do with the federal property interest in the FGROW.[20]

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[19] *See* Roberts *supra* note 15.

[20] Under the Pacific Railroad Acts (and presumably all other statutes where end points for construction were specified), priority to right of way arose when the railroad grant at issue was passed by Congress, making known the general location of the

E. Even if 1875 Act FGROW were somehow less than charter right of way, they still manifest a substantial federal retained interest.

Petitioners and their *amici* are misleading in their argument that FGROW is just another state law easement for another set of reasons: they mischaracterize state law railroad easements, and they fail to recognize Congressional power over termination of FGROW, even if it were otherwise construed to be some sort of easement. Speaking about railroad easements generally, and not simply FGROW, the early decisions of this Court explained that "[a] railroad easement is a very substantial thing. It is more than a mere right of passage. It is more than an easement." *Western Union Telegraph Co. v. Pennsylvania Railroad Company*, 195 U.S. 540, 570 (1904). "A railroad's right of way has, therefore, the substantiality of a fee . . . ." *Id.* at 571. If a railroad's right of way was an easement it was "one having the attributes of a fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property." *New Mexico v.*

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road. *See St. Joseph & D.C. RR v. Baldwin*, 103 U.S. at 426 (1880). The federal right of way grant became definite as to location only upon filing the map of definite location or by construction. *See Nielsen v. Northern Pac. R. Co.*, 184 F. 601 (9th Cir. 1911). Under the 1875 Act, there was no longer a specific granting statute specifying end points. Instead, the railroad filed a profile of its road, or actually constructed it, and it obtained priority over subsequent claimants from the date of filing of the profile, or actual construction, whichever first occurred. *See* 43 U.S.C. § 937; *Boise Cascade Corp. v. Union Pac. R. Co.*, 630 F.2d 720, 723 (10th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981). This shift was not a policy shift, but merely a consequence of no longer identifying end points.

United States Trust Co., 172 U.S. 171, 183 (1898). The Court likened a railroad easement to a "fee in the surface." *Id. See generally Chicago Great Western R.R. Co. v. Zahner*, 177 N.W. 350, 351 (Minn. 1920) (a railroad easement is unlike any other; it commands "uninterrupted and exclusive possession and control of the land . . . except where built on a public highway or over public crossings" and the "former owner has no right to occupy" the surface estate except by consent of the railroad). In short, under state common law, an underlying fee owner had no right of occupancy or possession at all in a rail easement. This was the prevailing view in the states. *See id.*

In the case of FGROW, the grant of the surface estate to the railroad was at least as onerous as it would have been under a state law easement, because, as Congressman Hoar implicitly recognized as the 1875 Act was adopted, Congress intended a uniform policy across all states and territories: "state law cannot operate to 'impair the efficacy' of a federal grant or vest title in someone other than the federal grantee." *Boise Cascade Corp.*, 630 F.2d at 724, citing *Packer v. Bird*, 137 U.S. 661, 669 (1891), *Shively v. Bowlby*, 152 U.S. 1, 44 (1894), and *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267, 270 (1903).[21] States could not interrupt a federal corridor even by eminent domain. Establishing a street upon it was impossible, even in cities growing up around the FGROW. *H.A. &*

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[21] In *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. at 272, this Court explained that in providing for a FGROW, Congress conclusively determined the strip covered was necessary for an important public work: "The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

L.D. Holland Co. v. Northern Pac. Ry. Co., 214 F. at 926.

There is another aspect of FGROW germane here: its perpetual duration. Under applicable Supreme Court cases, railroad grants, once made, last forever, even if they require a road to be constructed within a specific time period, unless Congress adopts a specific Act declaring forfeiture or the United States brings a proceeding authorized by law to determine forfeiture. *See, e.g., Schulenberg v. Harriman*, 88 U.S. 44, 62-64 (1875) (forfeiture for non-construction is a condition subsequent which can only be raised by the United States, either in a proceeding authorized by law or by a "legislative assertion of ownership . . . for breach of the condition").[22]

Congress responded to *Schulenberg* by adopting the Act of Sept. 29, 1890, 26 Stat. 496, basically providing for forfeiture of grants in aid in the event of non-construction. But the statute did not apply to FGROW and station lands by its terms. Congress addressed forfeiture of some 1875 Act FGROW for non-construction in the Act of June 26, 1906, 34 Stat. 482, codified as amended at 43 U.S.C. § 940.[23] But these statutes still did not provide a means to terminate

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[22] *Schulenberg* involved the same rail line at issue in the Seventh Circuit's *Samuel L. Johnson* decision.

[23] In a fashion similar to the Act of Sept. 29, 1890, for grants in aid, Congress provided for forfeiture of 1875 Act FGROW not in compliance with the five year deadline for construction specified in 43 U.S.C. § 937. However, section 940 applied only to pre-1909 grants under the 1875 Act. As the legislative history of section 912 indicates, Congress was well aware prior legislation did not address other forfeitures, nor termination of a FGROW if rail used ceased, or if there was a relocation.

most FGROW. Congress ultimately settled on a two-step process for terminating FGROW.

Prior to the end of World War I (when the built-rail system was at its peak), abandonments of railroad rights of way (including FGROW) were rare, and generally not permitted by the state charters and laws under which railroads operated. In 1920, Congress gave plenary and exclusive authority over railroad construction and abandonment to the Interstate Commerce Commission (ICC), *see Colorado v. United States*, 271 U.S. 153, 164-65 (1926). Although the ICC was abolished in 1996, Congress transferred the agency's jurisdiction over economic regulation of railroads, including its exclusive jurisdiction over rail abandonments and discontinuances, to the Surface Transportation Board (STB). *Compare* 49 U.S.C. § 10501(b) (express preemption of state abandonment regulation) with 49 U.S.C. § 10903 (STB authority over abandonment).

It is well-established that ICC (and STB) do not determine if a railroad line is "abandoned." Instead, if ICC—now STB—determines that the "present or future public convenience and necessity require or permit abandonment," (49 U.S.C. § 10903(d)), the agency may authorize it. Any state law relating to disposition of railroad lines (*e.g.*, law regarding easement extinctions and eminent domain) is preempted until ICC (now STB) authorizes abandonment and that authorization becomes effective.[24] Whether a federally-regulated common

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[24] *See Hayfield Northern R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984) (eminent domain only after abandonment authorization is effective); *Kansas City Area Transp. Co. v. Ashley*, 555 S.W.2d 9 (Mo. 1977), *cert. denied*, 434 U.S. 1066 (1978) (no state law abandonment absent ICC

carrier service over the line is in fact "abandoned" then depends on the actions and intent of the railroad. *E.g.*, *Vieux v. East Bay Regional Park District*, 906 F.2d 1330, 1339 (9th Cir. 1990), cert. denied, 498 U.S. 967 (1990). Even if ICC (now STB) authorized abandonment (of federally-regulated common carrier service on a line), the railroad may continue use of the line for non-common carrier purposes (*e.g.*, car storage or industrial track), in which case it is not in fact abandoned for purposes of extinguishment of state law easements or base fee reversions. *See, e.g., State of Idaho v. Oregon Short Line*, 617 F. Supp. 213 (D. Idaho 1985) (line authorized for ICC abandonment but not abandoned because of car storage use). But if the rail line is authorized for abandonment, and that abandonment is consummated by cessation of service and other indicia such as removal of tracks, then it may be deemed "abandoned" under state law (what most lay people probably mean when they say "abandonment). In all circumstances, only after ICC/STB abandonment authorization can state law be applied to determine whether state railroad easements automatically extinguish, and whether state base (or determinable) fees revert.

There is, however, an additional step before a FGROW may be deemed actually abandoned. This additional step flows from the fact that FGROW lasts in perpetuity unless the United States terminates it. Congress addressed the issue of termination of FGROW in a comprehensive fashion for the first time in 43 U.S.C. § 912. That statute on its face applies to all FGROW, from the original 1835 grant to those

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authorization); *Trustees of the Diocese of Vermont v. State*, 496 A.2d 151, 154 (Vt. 1885) (similar). Preemption is specifically provided in 49 U.S.C. § 10501(b).

created under the 1875 Act. The section 912 "trigger" for termination of the FGROW parcels is a judicial decree of abandonment or forfeiture, or an Act of Congress providing for forfeiture. An ICC (now STB) authorization for abandonment is not equivalent to a determination of abandonment; and Congress wanted certainty on whether a FGROW was abandoned. For one year following the date of the trigger, a state or local government may "establish" a public highway on the FGROW. If a state or local government does so, then it is automatically vested with the FGROW. If it does not, then section 912 provided that the FGROW vested automatically in any municipality which it traversed, or in the owner(s) of the legal subdivision(s) traversed if the FGROW was not located within a municipality.

The legislative history for section § 912 makes it clear that Congress meant exactly as is portrayed above. H.R. REP. NO. 851, at 2 indicates that (following the advice of the Department of Interior) the language in the current statute was modified:

> [S]o it may be clear vesting of title in the landowner and his right to occupy and use the same shall only occur after there has been a forfeiture of the right of the railroad company or when an abandonment has been actually ascertained and decreed. The bill [as it previously stood] might [have been] construed to leave the determination of abandonment to the landowner, which is manifestly unworkable.

When Congress adopted the National Trails System Improvements Act of 1988, it modified 43 U.S.C. § 912 by providing that upon the section 912 "trigger" event (generally the judicial declaration of abandonment), the FGROW interest vests in the United States unless

a state or local government establishes a public highway on the FGROW within one year of the "trigger." As a result of Congress's control over the termination of FGROW, there is necessarily a retained federal interest in all FGROW, and however that is characterized, it is a sufficient operational basis for Congress to determine who uses and possesses the surface estate and when. Thus, although the surface estate in all FGROW is better analyzed as a kind of limited fee, over which the United States has a reverter or power of appointment, there is sufficient federal interest for application of section 912 to 1875 Act FGROW.

III. The Federal Government Has a Retained Interest in 1875 Act FGROW to Which Section 912 Applies.

As this Court has recognized many times, property rights may be relative, stronger as against one claimant and weaker as against another. *E.g., INS v. AP*, 248 U.S. 215 (1918) (property rights of competitors in business limited as between each other but not as against the public). The common law has also long recognized relativity of rights; for example, a peaceful possessor of land has superior rights to non-possessors, but not as against the true owner. *Tapscott v. Lessee of Cobbs*, 52 Va. (11 Gratt.) 172 (1854).[25]

The relativity of property rights can exist between owners and possessors, and between private owners and the government. This is clearly illustrated in the litigation on FGROW. *Stringham* and *Townsend* involved the right of the railroad (owner of a FGROW)

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[25] *See also* Larissa M. Katz, *The Concept of Ownership and the Relativity of Title*, JURISPRUDENCE 191-203 (2011).

against private third parties. *Great Northern* and *Union Pacific* involved the rights of the railroad (owner of a FGROW) against the United States (which claimed the mineral interest). The ultimate outcome in all the cases may be correct, given the relativity of property rights, but the reasoning based on an alleged policy change in or prior to the 1875 Act is not sound. *Accord Kunzman v. Union Pacific*, 456 P.2d 743 (Colo. 1969) (reconciles *Townsend* and *Union Pacific* by observing one applies to the rail interest as against a private party and the other applies to the rail interest as against the government).

The federal retained interest is frequently analogized to a "power of termination" or "possibility of reverter."[26] Congress in effect retains a reverter, or a general power of termination, over FRGOW from their inception. Congress exercised that power on adoption of 43 U.S.C. § 912, which created an "expectancy"—not a property right—that state and local governments, municipalities, or owners of underlying legal subdivisions might eventually acquire FGROW, in accordance with, and in the order of priority, provided in the statute, in the event of a judicial declaration of abandonment. That "expectancy" was withdrawn as to all except state and local highway authorities in 1988, when 16 U.S.C. § 1248(c) was adopted. Congress was and is free to re-

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[26] *See Samuel C. Johnson 1988 Trust v. Bayfield County*, 520 F.3d 822, 831 (7th Cir. 2008); *Marshall*, 31 F.3d at 1032, quoting *State of Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207. Sometimes commentators treat power of termination and possibility of reverter as essentially the same. However, one can be said to be automatic upon the occurrence of an event (reverter), and the other is discretionary in the holder (power). Allison Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins*, 210 U. CHI. L. REV. 215 (1953).

direct the interests in the FGROW (right to exclusive possession and use of the surface), including retaining them in the United States, until title vests pursuant to a judicial declaration of abandonment or Act of Congress relating to forfeiture as provided in 43 U.S.C. § 912.[27]

Petitioners argue that the United States deeded away its retained interest when it issued the patent to Brandt's predecessor in 1976. But the FGROW grant in 1908 unquestionably had priority over the 1976 patent. As Congressman Hoar recognized in the 1875 Act legislative history already quoted, the federal interest in the FGROW continued even if all the surrounding public land was deeded away. Petitioners' predecessor took no interest in the FGROW surface estate. The Executive Branch through a patent cannot defeat a retained interest

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[27] *Brown v. State of Washington*, 924 P.2d 908, 916-17 (Wash. 1996), illustrates the operation of the federal retained interest as a power of termination. In *Brown* the right of way of the bankrupt railroad acquired by the state pursuant to the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901-922, included both privately deeded parcels and 1875 Act FGROW parcels. As to the federal right of way, the Washington Supreme Court ruled that it did not vest in the owners of the underlying legal subdivisions because there had not been a judicial declaration of abandonment triggering vesting of rights under section 912. Instead, Congress had authorized the railroad (through its trustee and the reorganization court) to sell its federal right of way interest for non-railroad purposes prior to any such declaration. The concurring Justice explained that the claim of abutting landowners to FGROW is governed by 43 U.S.C. § 912 "which in effect made a conditional promise of a future gift to the abutters. That condition, a declaration of abandonment . . . by Congress or a court, never occurred . . . . [A]butters [therefore] acquired no vested rights in the land and no title to the [1875 Act] parcels." 924 P.2d at 924.

created by Congress, because that would usurp Congress's decision to bestow on state and local governments a future, contingent property interest in the right of way for public highway purposes. *See Samuel C. Johnson 1988 Trust*, 520 F.3d at 831-32.

Even if a patent could cut off some kinds of federal interest, it does not terminate the FGROW itself. The only way to do that is by judicial declaration of abandonment, or by a decree or congressional act of forfeiture. If the patent somehow renders 43 U.S.C. § 912 inapplicable to the railroad corridor, then there is no mechanism to end the existence of the right of way and Petitioners still lose.[28]

Finally, while it is clear Congress intended section 912 to apply to all FGROW, if this now somehow constitutes a "taking" because of an alleged policy shift or otherwise, then the Tucker Act of 1887, 28 U.S.C. §1491 (1887)) remedy renders it constitutional. *U.S. v. Causby*, 328 U.S. 256, 267 (1946).

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[28] As discussed above, an ICC or STB abandonment authorization is not equivalent to a judicial declaration of abandonment or a congressional act of forfeiture required by section 912.

CONCLUSION

The Tenth Circuit's decision and judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

NOV 22 2013

No. 12-1173

IN THE

Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST
AND MARVIN M. BRANDT, TRUSTEE,

Petitioners.

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and those of its supporters, on the question presented in this case, namely, whether the United States retained an implied reversionary interest in rights of way granted under the General Railroad Right of Way Act of 1875, 18 Stat. 482 (1875) ("1875 Act" or "Act"). Because NELF believes that the interest granted under the Act was an easement and not any form of fee, NELF believes that the United States retained *no* reversionary interest in the rights of way.

NELF is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. NELF's members and supporters include both large and small businesses located primarily in the New England area. NELF has previously filed amicus briefs in this Court,

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than Amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), Amicus also states that on October 21 counsel for Petitioners filed with this Court a general written consent to the filing of amicus briefs in support of either or neither party, and by letter of November 20 the Solicitor General granted consent, on behalf of Respondent United States, to the filing of this brief.

advocating, among other things, in defense of private property rights.[2]

NELF's association with "rails to trails" litigation extends back to the 1990s, when it commenced *pro bono* representation of the Preseaults. After this Court's decision in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990), NELF successfully represented the Preseaults before the Federal Circuit. *See Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). NELF therefore views with growing concern the protracted saga of "rails to trails" litigation that land owners across the country have had to endure because of the refusal of the United States to recognize their property rights and to compensate them for the use it wishes to make of their property for recreational trails.

The Government's dogged refusal is matched only by its willingness to adopt, over the years, virtually any position that will enable it to obtain something for nothing. In 1942, in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), when it sought ownership of mineral rights lying beneath a right of way, the Government argued that the 1875 Act granted easements; in the 1990s, in *Preseault*, when it wanted to acquire abandoned rights of way for free so that it could use them as trails, the Government argued that while the Act created easements, they had evaporated long ago as a result of federal regulation of railroads; now, thwarted by citizens, like the Petitioners, who refuse to settle for

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[2] *See, e.g., West Linn Corporate Park, L.L.C. v. City of West Linn*, No. 11-299 (cert. denied); *Vance v. Ball State*, 133 S.Ct. 2434 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

anything less than their full rights, the United States has discovered that the Act never created any easements at all, so that there now exist no Fifth Amendment impediments to its acquiring the rights of way free of charge.

For the reasons set forth in this brief, as well those set out in the Petitioners' brief, NELF believes that the Act did indeed create easements and that it did so without any special implied reversionary interest in favor of the United States. Indeed, there would have been no reason for the United States to retain an interest in strips of land only a few hundred feet wide once they were abandoned for railroad use. Since the Government's purpose in facilitating the building of railroads was to encourage settlement of the vast expanses of this country, *Great Northern*, 315 U.S. at 272, the most sensible and effective policy was, as the Act provides, to let land formerly used for the rights of way pass into the hands of those best able to make the fullest use of it—the homesteaders whose properties were crisscrossed by the rights of ways and whose ties to the land were the very thing that the Government sought to encourage.

SUMMARY OF ARGUMENT

The possessory element found in railroad rights of way has long been recognized as an intrinsic consequence of the nature of railroad operations. For a variety of compelling, practical reasons, a railroad must enjoy exclusive, or nearly exclusive, use and occupancy of its right of way. Both before and after the passage of the 1875 Act, courts and legal authorities commonly regarded such rights of way as easements. In 1898 this Court too recognized that there could be a "corporeal,"

possessory aspect to easements, such as those used as rights of way by railroads.

The Government's denial of the 1871 shift in congressional policy is not substantiated by the fact that Congress sometimes may have made a grant of a "strip of land" after that year. The phrase "strip of land" did not denote a fee when the grant specified the purpose of the grant and contained language limiting the interested granted to less than a fee. The Government's own example shows this to be true.

The Government badly misreads the debate that took place in the House of Representatives over the 1875 Act. The members did *not* agree that the United States would retain a property interest in the rights of way even after the underlying lands were patented away to private parties. On the contrary, the exchange the Government cites clearly demonstrates that the Act was understood to grant an easement only and that, in this regard, the Act stood in sharp contrast to legislation passed before 1871.

ARGUMENT

I. At The Time Of The 1875 Act, It Was Well Understood That A Railroad's Exclusive Use And Possession Of A Right Of Way Did Not Mean That The Railroad's Interest Could Not Be An Easement.

The Government has argued to this Court that when a railroad company was granted a right of way under the 1875 Act, the company's exclusive use and possession of the way meant that the interest granted was to be understood to be a fee interest. *See* Brief for the United States (in response to

petition for certiorari) ("U.S. Response Br.") at 5, 7, 9-10, 15. In fact, however, both before and after the Act was passed, it was widely recognized in the United States that a railroad right of way need not be a fee interest, but may be treated merely a distinctive type of easement, one rationally adapted to the purpose for which the right of way was granted.

While "[a] grant of a right of way to a railroad company is a grant of an easement merely, and the fee remains in the grantor," Leonard A. Jones, *A Treatise on The Law of Easements* § 211 at 178 (New York, Baker, Voorhis 1898), such an easement was understood to have distinctive features.

> "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by nonuser. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easement will be perpetual; so that, ordinarily, the fee is of little or no value unless the land is underlaid by quarry or mine."

2 Byron K. Elliott and William F. Elliott, *A Treatise on the Law of Railroads* § 938 at 432 (2d ed. 1907) (quoting *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427, 428 (1897)). *See also* 1 Isaac F. Redfield, *The Law of Railways* § 69 at 261 (J. Kendrick Kinney ed.) (6th ed. Boston, Little, Brown 1888) ("The right acquired by the corporation, although technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically

exclusive.") (quoting *Hazen v. Boston & Maine Railroad Co.*, 2 Gray 574, 68 Mass. 574, 580 (1854)).

The reason for these possessory features was traced back to the purpose for which the easement was given--to operate a railroad for the benefit of the public. *See* 2 Elliott, *Treatise* § 792 at 212-13 (railroads "affected with a public interest"); Edward L. Pierce, *A Treatise on the Law of Railroads* 158 (Boston, Little, Brown 1881) (grant of right to take land for purpose of railroad creates easement, and "property is . . . to be deemed taken for a public use itself"). The operation of a railroad entails responsibilities for both timely, reliable transportation and the safety of the public and of the company's employees.

> The interest of a railroad company in its location, although technically an easement, is not limited to an ordinary right of way, such as is acquired for highways, but it justifies a use of the land for all the purposes of a railroad. Its possession, except at crossings established by law, is permanent in its nature, and practically exclusive, such possession being essential to a safe and effective working of its machinery.

Id. at 159. As explained in another treatise of the time, "[t]he railway company must, from the very nature of their operations, in order to [i.e., for the purpose of] the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land." 2 H. G. Wood, *A Treatise on the Law of Railroads* § 242 at 769 n.1 (Boston, Boston Book 1889).

The same author quotes at length *Kansas Cent. Ry. Co. v. Allen*, 22 Kan. 285, 1879 WL 836 (1879), which dealt with "a strip of land" taken by a railroad as a right of way under an 1868 Kansas statute. *See id.* at 771 n.2. Formerly, Kansas law had provided that a title in fee simple was acquired. *Allen*, 1879 WL 836, at *5. After 1868, however, although the railroad continued to enjoy "perpetual use of the land," the law provided for a "mere easement," and then, "[u]pon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revest in the proprietor of the soil." *Id.* *See also* An Act Concerning Suspended Railroads, 1868 Ohio Laws 142, 143 § 6 (providing for forfeiture of railroad right of way and reversion "to the owner of the fee of the land covered by the easement and right of way"). Until abandonment, "[t]he paramount right is with the railroad company, and the land-owner can do nothing which will interfere with the safety of its road, appurtenances, trains, passengers, or workmen," and this was true even if "[i]n some cases, the right of the owner of the soil would practically not amount to anything, because the purposes of a railroad company might require the use of all the land taken to such a degree as to forbid the owner from any benefit whatever." *Allen*, 1879 WL 836, at *5.

Another authority, also approximately contemporary with the 1875 Act, summarized the law of the time concerning the scope of a railroad easement and the nature of railroad operations:

> There is no question but that the company is entitled to the exclusive possession of the right of way, *if such possession is necessary to the proper*

> *operation of the road.* Some courts hold that the company is entitled to such exclusive possession from the nature of the case and as matter of law. Other courts hold that it is a question of fact whether the necessities of the company require the exclusive occupancy of the right of way, and what use of the same by the owner of the fee is not inconsistent with the company's rights. The latter is the prevailing doctrine, where only an easement vests in the company.

John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 586 at 755-56 (Chicago, Callaghan 1888) (emphasis in original).

This Court itself also has recognized that railroads may enjoy right-of-way easements that confer on them rights of exclusive use and occupancy. In *Territory of New Mexico v. United States Trust Co. of New York*, 172 U.S. 171, 181-82 (1898), the Court said of a right of way, "Obviously, it may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities, respectively, are."

The issue before the Court in that case was whether various items of a railroad's personal property, by being permanently attached to its right of way, could be taxed by the territory, for the railroad had been federally chartered under an act of 1866 and its right of way was exempted by Congress from taxation. *Id.* at 175-176. The territorial taxing authorities argued that the personal property of the railroad could not escape taxation by being,

supposedly, made part of the right of way, because the property, being tangible, could not become part of something abstract like a right of way. *See id.* at 181. The railroad countered that its right of way was a fee or, alternatively, if a lesser interest, then still "such a tangible and corporeal property . . that all that was attached to it became part of it and partook of the exemption from taxation." *Id.* The Court found it unnecessary to decide the exact nature of the interest, whether fee or easement, ruling simply that the railroad's right of way did possess a "corporeal quality," and thus the property permanently affixed to it was tax-exempt. *Id.* at 184-85.

In its reasoning, the Court first noted that in the usual case an easement involves "noncontinous" use, whereas "a way not of that character, whose use would be continuous, not occasional, and which would embrace the entire beneficial occupation and improvement of the land [i.e., like a railroad right of way], *might* require the fee for its enjoyment,—certainly would require more than a mere right of passage." *Id.* at 183 (emphasis added). But then the Court went on to consider the alternative possibility, advanced by the railroad, that the company enjoyed a "tangible and corporeal" but non-fee interest. *Id.* at 181. The Court quoted the same Iowa and Massachusetts cases also quoted by the treatises discussed above. *See supra* pp. 5-6. First, it quoted *Smith v. Hall* for the proposition that a railroad "easement is not that spoken of in the old law books, but is peculiar to the use of a railroad," and then it quoted *Hazen v. Boston & Maine* for the proposition that the right acquired by a railroad company was an easement that "requires for its enjoyment a use of the land permanent in its nature

and practically exclusive." *See New Mexico*, 172 U.S. at 183.

The Court then turned to several other state cases. Notably, in one, *City of Winona v. Huff*, 11 Minn. 119, 1866 WL 1507 (1866), a case where private land was dedicated for use as a public square, the Supreme Court of Minnesota ruled that although the fee remained with the grantor "subject to the dedication," an interest passed that was not a "mere easement," echoing the Massachusetts and Iowa cases quoted by the Court in *New Mexico*. *Id.*, 1866 WL 1507, at *11. Observing that "different purposes may require different interests or estates to support them," the Minnesota court understood the dedication statute in question to pass not merely an easement for use of the land but also for "the possession thereof, so far as is *necessary* to accomplish these objects," i.e., the "public purposes" for which the grant was made. *Id.* (emphasis in original). Again, all the while, the actual fee simple remained indisputably in other hands, "subject to the dedication." *Id.*

In another case cited by the Court, *Southern Pacific Co. v. Burr*, 86 Cal. 279, 282, 283, 24 P. 1032 (1890), the California Supreme Court, considering a railroad right of way granted in 1862 by Congress, was asked to decide whether the railroad had a sufficiently tangible interest in the land to support an action for ejectment or whether it enjoyed "only an easement," an "incorporeal hereditament." The court upheld the ruling of the lower court that the grant of a 200-foot wide right of way, dedicated to the public purpose of constructing a railroad, "necessarily involves a right of possession." *Id.*, 86 Cal. at 284.

> [I]n order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons. This is obvious enough as to all the land upon which a track, a depot, or other superstructure is placed, and we think the same is true of the whole two hundred feet on each side of the track.

Id. at 285. The court found this possessory element to be sufficiently corporeal, even in the absence of a fee, to support an action for ejectment. *See id.* at 284-86 (relying in part on *City of Winona*).

That this Court understood both *City of Winona* and *Burr* to involve *easements* is readily apparent from the remark it made differentiating a third case from these two. The Court noted that "[i]n this [third] case it was held that the interest taken by the railroad was not an easement." *New Mexico*, 172 U.S. at 184 (citing *New York, S. & W. R. Co. v. Trimmer*, 53 N. J. Law 1, 20 Atl. 761 (1890)).

Thus, contrary to the Government's view of *New Mexico* and of railroad rights of way, nothing about the manner in which railroads used and occupied rights of way granted under the 1875 Act requires a fee, as courts and legal authorities generally recognized in the era of the Act itself and as the Court recognized again, much later, in *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 272 (1942) (use for railroad "does not compel a

construction of the right of way grant as conveying a fee title to the land").

Moreover, there is an additional reason why the 1875 Act should be read as having granted rights of way as easements. This Court has noted "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957). To the extent, therefore, that there may be any "doubts" about the operation of the 1875 Act, the more parsimonious view should be taken and the Act viewed as having granted an *easement* because, even with possessory features like those described above, such a grant represents the relinquishment of a lesser Government interest than would the grant of a fee.

Indeed, the Government itself once argued strenuously to this Court in favor of such a reading of the Act. *See* Brief of the United States, *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942) (No. 149), 1942 WL 54245, at 12-14, 36-37 ("The mere fact that the right of way has some of the attributes of a fee—'perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property'—does not require the conclusion that the right of way is not an easement.") (citing *New Mexico*).

II. In Its Effort To Obscure The Fact That The 1875 Act Granted Only Easements, The Government Obscures The Meaning Of Texts It Quotes.

A. The 1871 Shift To Easements Cannot Be Denied Merely Because "A Strip Of Land" May Have Been Granted After That Year.

In *Great Northern*, the Court found that in 1871 Congress shifted from granting railroads land in fee to granting them rights of way in the form of easements. 315 U.S. at 273-75. In an attempt to undermine the historical reality of this shift, the Government, in its response to the petition for certiorari, pointed to acts, passed *after* 1871, in which Congress grants a railroad a "strip of land," a phrase, the Government asserts, "generally" implying a fee and not an easement. U.S. Response Br. at 12-13. The Government states that the interest conveyed turns on "whether the granting clause conveys a *designated strip or piece of land* or whether it basically refers to a right or privilege with respect to the described premises." A. E. Korpela, Annotation, *Deed to Railroad Company as Conveying Fee or Easement* § 3[b], 6 A.L.R. 3d 973, 978 (1966)), quoted in U.S. Response Br. at 13 (emphasis added by Government).

In fact, the authority the Government quotes is careful to say that "a strip of land" generally implies a fee "[i]n those instances in which . . . there is no language in the deed relating to the use or purpose of the grant, or limiting directly or indirectly the estate conveyed." *Id.* The post-1871 act that the Government uses as its example contained *both* kinds of qualifiers. It stipulated that the strip of

land was granted "for the purpose of aiding in the construction of a railway and telegraph-line," and it provided that the lands "over which the line of said road shall pass shall be sold . . . *subject to such right of way*," phrasing that clearly indicates that the interest granted is a mere servitude imposed on the lands "over which the line of said road shall pass."[3] *See* Act of February 5, 1875, ch. 35 §§ 1, 2, 18 Stat. 306-307.

In short, both the text of the Government's own cited authority and that of its own example contradict its denial of the shift that took place in congressional policy in 1871.

B. The Government Cannot Impress The Congressional Record Into The Service Of Supporting Its Case.

As the Petitioners have shown, the legislative history of the 1875 Act amply supports their position. A significant shift in congressional policy toward railroads really did take place in 1871, memorialized most notably in the 1875 Act.

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[3] In its response to the petition for certiorari, the Government dismissed the legal effect attributed to such "subject to" expressions by the Court in *Great Northern*, stating that such phrases have been used by the Court itself to refer to a fee. *See* U.S. Response Br. at 13-14. Of course, however, merely using a phrase beginning with "subject to" in the course of discussing property relations is not the same as using the phrase in an utterance that has the legal effect of *creating* a specific kind of property relation, as did the Act of February 5, 1875, cited by the Government. The Government also argued that such phrases do not imply an easement because they are known to occur in grants of "a strip of land." *See* U.S. Response Br. at 13. As discussed above, it is precisely when a fee is granted "subject to" a strip of land that the latter is understood to be an easement.

The Government, however, in its attempt to deny this shift, has plucked a single brief passage from the Congressional Record. It claims that "in presenting the 1875 Act for a vote on the floor of the House of Representatives, the chairman of the responsible committee agreed that, even after the underlying lands were conveyed, the railroad rights-of-way would constitute 'property of the United States,' just like the rights-of-way granted in the 1862 and 1864 Union Pacific statutes," i.e., *before* the 1871 congressional shift to granting only easements. U.S. Response Br. at 14 (quoting 3 Cong. Rec. 406 (1875)).

The Government incorrectly portrays the exchange in question, however. The exchange was between the committee chairman, Mr. Townsend, and another member, Mr. Hoar. It occurred as part of an extended discussion about what powers the states should exercise over the rights of way and over the railroads. 3 Cong. Rec. 405-407. Mr. Hoar first spoke to express his concern to protect the "just authority of the States" in a number of matters relating to railroad rights of way. 3 Cong. Rec. 405. Then—at least, as the Government reads the record—after Mr. Hoar next spoke, Mr. Townsend allegedly "agreed" with him that rights of way granted under the bill would constitute United States property, "even after the underlying lands were conveyed," in the Government's words. *See* U.S. Response Br. at 14.

In fact, Mr. Townsend never agreed with any such statement because Mr. Hoar never made the statement ascribed to him by the Government. Mr. Hoar, who, as part of the same exchange, denounced the "aggressions of the railroad companies" under the preceding regime of land

grants, 3 Cong. Rec. 406, merely imagined two scenarios in which the power of the states might be thwarted by the railroads. In the first, a right of way lies on "a tract of land *owned* by the United States, over which a railroad under the authority of the United States passes." *Id.* (emphasis added). Mr. Hoar stated that any exercise of state power over "that location" would amount to ineffectual "meddling" with the property of the United States. *Id.* (Earlier he had briefly set out the same scenario, indicating that he believed the objection to be a valid one. *See* 3 Cong. Rec. 405.)

In the second scenario, however—the one on which the Government draws for support—Mr. Hoar imagined that the United States had "*parted with* all its public lands in the State," and "*still*" a railroad would object to state regulation on the grounds that the land "you are dealing with is the property of the United States." 3 Cong. Rec. 406 (emphasis added). It should be obvious that, in setting out this objection, Mr. Hoar is *not* expressing his own view, as his use of "we" and "us," referring to the railroads, highlights. *Id.* ("the right of way with which we are clothed was given to us by the United States"). He is merely imagining an objection a railroad might grasp at "still"—i.e., despite the fact that the underlying lands had been "parted with" by the United States— in the hope of being able to continue to escape state regulation and commit "aggressions" against the public. That Mr. Hoar himself fully believed that the bill granted only an *easement* is shown by his earlier observation that all that the railroads acquired under the bill was "the *use*" of the land, "so that the title consists in the *ownership by the United States*." 3 Cong. Rec. 405 (emphasis added). That means, of course, that once the United

States has conveyed the ownership of the underlying land into private hands (i.e., has "parted with" the land), the right of way, too, ceases to be the property of the United States.

The objection Mr. Hoar puts into the mouth of the railroad, then, is not supposed to be a sound objection—that's Mr. Hoar's point—just a disruptive one, aimed at thwarting the states once again and requiring, as Mr. Hoar says, recourse to Congress to straighten things out. *See* 3 Cong. Rec. 406. It is at this point in the exchange that Mr. Townsend says, "Is not that the condition in which the Union Pacific Railroad stands in Kansas and has stood, and in California too?" *Id.* Pointedly, Mr. Hoar agrees, declaring that this was one of the things *wrong with the grants made up to 1870.*

> Undoubtedly; and I desire to say, as my friend puts the question, that I regard as a most lamentable fact in our history the carelessness with which between 1863 and 1865, or 1870, Congress dealt with the great function of incorporating these great highways. . . . I think one of the most distressing facts in our history is the example of carelessness and fraud which was set in the organization of these roads.

Id.

In short, neither Mr. Hoar nor Mr. Townsend said or agreed that grants made under the 1875 Act would remain the property of the United States even after the underlying fee had been conveyed away to homesteaders or other private parties. The Government must look elsewhere for support.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1173

In The Supreme Court Of The United States

MARVIN M. BRANDT REVOCABLE TRUST,
AND MARVIN M. BRANDT, TRUSTEE,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE STATES OF NEW MEXICO, OREGON, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the United States retains an interest in rights-of-way granted from public lands to railroads under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934-939, such that the disposition of such rights-of-way is governed by 43 U.S.C. § 912 and 16 U.S.C. § 1248(c).

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Darwin P. Roberts,
The Legal History Of Federally Granted Railroad Rights-Of-Way And The Myth Of Congress's "1871 Shift,"
82 U. Colo. L. Rev. 85
(Winter 2011) 18, 20, 29-31, 33-35

INTERESTS OF THE AMICI STATES

The amici States contain railroad rights-of-way granted by the United States under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934-939 (1875 Act). The States have an interest in this Court's accurate determination of the property interests in these rights-of-way. The federal government has enacted a policy of making former federally granted railroad rights-of-way available for alternative transportation purposes, including highways and trails. The amici States contain federally granted railroad rights-of-way that have been converted to such purposes, and most of these highways and trails are administered by the States or their political subdivisions. In the State of Washington, for example, a former railroad right-of-way, comprised in part of lands granted under the 1875 Act, has been converted into the popular Iron Horse State Park and John Wayne Pioneer Trail. Many other federally granted rights-of-way exist within Washington and the other amici States, which may become available for conversion to highways or trails.

The Court's determination that the United States retained an interest in 1875 Act rights-of-way sufficient to authorize their conversion to highways and trails will support enacted federal policy and the amici States' interest in promoting highway and non-motorized transportation for the benefit of their citizens.

SUMMARY OF ARGUMENT

The Tenth Circuit should be affirmed. The United States retains two distinct types of interest in the railroad rights-of-way granted under the 1875 Act: a reserved right to "alter, amend, or repeal" the use of the rights-of-way; and a fee simple interest in the underlying land. The government retained, and intended to retain, both interests because the purpose of Congress's grants was to create transportation corridors for the benefit of the American public as a whole. Based on the text of the 1875 Act and its predecessor statutes, and their legislative history, the best understanding of these federally granted rights-of-way is that they consist of robust railroad "easements" defined by federal law and subject to federal control, with the fee interest in the underlying property remaining in federal ownership. The United States may "alter or amend" the use of an 1875 Act right-of-way in favor of a different transportation purpose, such as a highway or trail. In addition, if the right-of-way is legally abandoned, the United States controls the disposition of the property.

Petitioners' argument to the contrary is premised upon *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942). *Great Northern* held that in 1871, Congress changed from granting "limited fee" railroad rights-of-way, with an implied reversion in the United States, to granting "easement" rights-of-way. Congress, it stated, wished to stop "granting lands" or mineral rights to railroads and instead wanted to preserve the public lands for homesteaders. But, while *Great Northern* was likely correct that Congress did not wish to

grant mineral rights to railroads in 1875 Act rights-of-way, *Great Northern* did not reach the issue of what interest the United States government retained in an 1875 Act right-of-way. In fact, there is no evidence that Congress intended to make any change to the federal government's interests in railroad right-of-way grants. The *Great Northern* Court's analysis did not address the significant differences between "checkerboard" subsidy land grants to railroads, which Congress ceased to pass after 1871, and the government's interests in its federally granted railroad rights-of-way, which Congress continued to grant, following its prior practice without significant change. Responding to language in *Great Northern*, lower courts have erroneously concluded the United States intentionally surrendered any government interest in rights-of-way granted after 1871. Again, there is no evidence Congress intended any such change. The Court should clarify that, based on both statutory text and legislative history, the United States retained an interest in federally granted railroad rights-of-way from both before and after 1871.

There are multiple reasons for this Court to hold in favor of the United States. First, the text of the 1875 Act explicitly reserves to the United States the right to "alter, amend, or repeal" that Act. Exercising that reserved authority, Congress altered and amended the 1875 Act through legislation in 1922 and 1988. That legislation provided that if railroad rights-of-way granted under the 1875 Act (and other similar statutes) were no longer needed for railroads, the rights-of-way could be used for other transportation purposes that would benefit the

public, including highways and trails. Accordingly, when the United States issued a patent to Petitioners' predecessors-in-interest in 1976, it transferred the land subject to the right-of-way granted under the 1875 Act, and Congress's specific retained authority to change the right-of-way's use. Here, the use was permissibly changed to a trail. On this basis alone, the Tenth Circuit's decision in favor of the government should be affirmed.

Second, the right-of-way granting language in the 1875 Act is virtually the same as all of Congress's right-of-way grants from the 1830s through the 1860s, each of which granted a robust federally-defined right-of-way, sufficient for exclusive railroad purposes, while retaining federal ownership of the land under the right-of-way. Congress gave no clear signal that it intended the 1875 Act to change its longstanding practice, meaning the 1875 Act should be interpreted to convey the same real property interest as previous grants. In addition, the text of the 1875 Act directly linked it to the 1864 Pacific Railroad Act, through its incorporation by reference of the 1864 Act's right-of-way condemnation authority. This linkage also strongly suggests that both right-of-way grants involved the same type of government interest.

Third, even if this Court found the text of the 1875 Act ambiguous as to the interest of the United States, the Act's legislative history explicitly states that Congress expected the United States to retain the fee ownership of the land underlying 1875 Act railroad rights-of-way, even if it parted with ownership of the other public lands in the vicinity. An 1875 Act right-of-way was described in debate as

having the same legal status as the rights-of-way granted under the railroad "land grant" acts of the 1860s, such as the Union Pacific Railroad. Congress retained this ownership to preserve the right-of-way corridor for public purposes, including transportation, mail delivery, or troop movements in the newly developing territory, if the grantee railroad corporation happened to fail.

Fourth, Petitioners' arguments that an 1875 Act right-of-way is the equivalent of a common-law easement are premised in part on a historical error, one that unfortunately finds superficial support in some of the reasoning from *Great Northern*. Based on certain legislative history, *Great Northern* concluded that when Congress ceased granting checkerboard land subsidies to railroads in 1871, it also intended that its right-of-way grants would not convey any mineral rights to the railroads. Petitioners, citing *Great Northern* and certain lower court decisions, make the further claim—not decided by *Great Northern*—that after 1871, Congress also intended to surrender all future federal interest in federally granted railroad rights-of-way to homestead patentees.

That claim is simply wrong, and unsupported by the legislative history and statutory text. Federal right-of-way grants to railroads originated before checkerboard land subsidy grants, continued alongside the subsidy grants, and persisted after the subsidy grants ended. Throughout, Congress intended to retain ultimate ownership and control of such property. When checkerboard land grants ended around 1871, there is no indication Congress intended to make any parallel change in right-of-way

grants. Congressional comments about ending "grants of lands," cited in *Great Northern*, were focused on ending checkerboard land subsidies to railroads, not changing the real property status of federally granted railroad rights-of-way. Relative to the colossal and unpopular checkerboard subsidy grants, the acreage covered by the rights-of-way was vanishingly small. There is no legislative history whatsoever indicating that anyone in Congress intended that, after 1871, Congress should change forty years of established right-of-way granting practice to give homesteaders fee title to lands that would lie *under* railroads' tracks for the foreseeable future.

ARGUMENT

I. The Text Of The 1875 Act And Subsequent Legislation Authorized The United States To Convert The Wyoming Right-Of-Way To A Trail

Congress retained the right to alter or amend the 1875 Act to promote the statute's purposes. That reserved right, along with subsequent legislation, allows Congress to alter the active use of an 1875 Act right-of-way for an alternative transportation purpose, regardless of who is deemed to own the land underneath it. In addition, the text of the 1875 Act is virtually identical to earlier right-of-way grants, to which the United States has been deemed to hold fee title, indicating that Congress also intended to hold the fee title to the land underlying 1875 Act rights-of-way.

A. The Text Of The 1875 Act Reserves To Congress The Power To "Alter, Amend, Or Repeal" The Act, Including The Power To Control The Use Of Rights-Of-Way Granted Under The Act

The text of the 1875 Act reserves to Congress broad powers to "alter, amend, or repeal" the statute. Congress altered the 1875 Act through subsequent legislation directing that 1875 Act rights-of-way no longer needed by railroads should be made available for alternate transportation uses, such as highways and trails. The government's transformation of the Wyoming right-of-way into a trail is consistent with this legislation, and well within the scope of the government's reserved powers. On this basis alone, the Court should affirm the judgment of the Tenth Circuit.

In "any case of statutory construction," the Court's analysis "begins with the language of the statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). "[W]here the statutory language provides a clear answer, [the analysis] ends there as well." *Id.* (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Section VI of the 1875 Act reserves to Congress the right to "alter, amend, or repeal" the Act, "or any part thereof." 43 U.S.C. § 939. In *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), the Court held that the meaning of an "alter, amend, or repeal" clause "has been settled since the *Sinking-Fund Cases*" in

the late 1870s. *Bowen*, 477 U.S. at 53 (citing *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 719-20 (1879)). Under such a clause, "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments as come within the just scope of legislative power." *Id.* at 53. In the *Sinking-Fund Cases*, the Court held that while the reserved power would not include depriving "persons or corporations of property without due process of law," Congress could "provide for what shall be done in the future," including action to "carry into effect the original purposes of the grant." *Union Pac. R.R. Co.*, 99 U.S. at 719-21. This might include providing for "the proper disposition of [the corporation's] assets." *Id.* at 720.

The reserved right to "alter, amend, or repeal" a statute carries further specific meaning in the context of Congress's grants to railroads between 1862 and 1875. The 1862 Pacific Railroad Act, the first transcontinental railroad grant, gave the Union and Central Pacific Railroads "the right of way through the public lands," substantial "checkerboard" land subsidies, and other aid to support construction. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668, 672-77 (1979). In Section 18 of the Act, Congress described in detail its "object" in making these grants:

> "[T]o promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same

> for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." 12 Stat. 489, § 18.

This reserved power was described in the debates on the 1862 Act as being among the reasons "[t]he interests of Government are carefully protected in the bill."[1] A virtually identical description of legislative purpose was included in the 1864 Northern Pacific Railroad Act.[2]

In several other railroad grants from this period, beginning with its 1864 legislation amending and expanding the 1862 Pacific Railroad Act, Congress retained the right to "alter, amend, or repeal" the grant, while dropping the lengthier language in the 1862 Act explaining the purpose of the reserved right.[3] Nevertheless, this Court held that both the expansive 1862 "alter, amend, or repeal" clause and its abbreviated 1864 sibling reflected the same legislative purpose: to promote the public interest and welfare, and to secure to the government (and thus the public at large) the transportation benefits from the construction of the railroad. *Union Pac. R.R. Co.*, 99 U.S. at 719-21. Congress regularly reserved the right to "alter,

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[1] Cong. Globe., 37th Cong., 2d Sess., 1580 (Apr. 8, 1862).

[2] Northern Pacific Railroad Act of July 2, 1864, 13 Stat. 365, § 20.

[3] Act of July 2, 1864, 13 Stat. 356. The amendatory act doubled the checkerboard land grant subsidy to the two railroads and added authority for the railroads to condemn right-of-way across any privately held land.

amend, or repeal" subsequent railroad grants, including the 1875 Act.

In the twentieth century, Congress chose to exercise its power to "alter, amend, or repeal" the 1875 Act grants through subsequent legislation. In 1922, Congress passed 43 U.S.C. § 912. The statute provided that whenever the United States had granted public lands for railroad purposes (including in grants other than the 1875 Act), and that land had been declared abandoned or forfeited by decree of a court of competent jurisdiction or by an Act of Congress, the United States would pass its interest in that land to the patentee (or successor) of each legal subdivision traversed by the right-of-way.[4]

Section 912 also contained three exceptions, under which the land would not pass to an adjoining patentee: (1) when any of the former railroad lands were embraced in a public highway legally established within one year after the abandonment or forfeiture; (2) when the lands lay within the limits

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[4] Petitioners suggest that Section 912 was, in essence, error by Congress that was invited by the decision in *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44 (1915). Pet'rs' Br. at 42-45. *Stringham* held that post-1871 rights-of-way, like pre-1871 rights-of-way, were "limited fees." Petitioners argue that this Court should ignore Section 912 because *Great Northern* disagreed with *Stringham*, holding that post-1871 rights-of-way were "easements." Pet'rs' Br. at 45. But *Great Northern* addressed only whether railroads received mineral rights in their 1875 Act rights-of-way. It did not consider whether Congress intended or enacted any significant shift in the government's interest in such rights-of-way around 1871. As described below, the statutory text and legislative history indicate that Congress intended to retain the same government interests as it had in earlier right-of-way grants.

of a municipality, in which case the statute transferred title to that municipality; and (3) the mineral rights, which were reserved for the United States under all circumstances. Effectively, then, the United States retained control of the rights-of-way to the extent they remained useful for transportation or mineral purposes, and voluntarily relinquished them if they were not.

In 1988, Congress enacted 16 U.S.C. § 1248 as part of the National Trails System Improvements Act, supplementing 43 U.S.C. § 912 and further altering the disposition of abandoned federally granted rights-of-way. Section 1248 amended 43 U.S.C. § 912 to provide that, rather than pass an otherwise unused right-of-way to a patentee of the underlying lands, the United States retained any rights it might have in such a right-of-way, to re-use them for purposes including recreational trails.[5]

Taken together, 43 U.S.C. § 939, 43 U.S.C. § 912, and 16 U.S.C. § 1248 authorize the actions taken by the United States in this case. Section 939 reserves to the United States the right to "alter, amend, or repeal" its rights-of-way granted to railroads under the 1875 Act. Under that section, any individual who subsequently acquired an interest in public lands traversed by an 1875 Act right-of-way took that interest "subject to" the right-

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[5] As Petitioners correctly note (Pet'rs' Br. at 49), because there was uncertainty as to the precise scope of the property interest the United States had retained in such rights-of-way, Congress stated that it intended to retain whatever interest it had. *See* Pub. L. No. 100-470, § 2, 102 Stat. 2281 (1988).

of-way grant, including the United States' right—reserved since the statute's 1875 enactment—to "alter, amend, or repeal" the grant. Under this Court's precedents, Congress's reserved right in Section 939 constitutes "special notice," to individuals taking subsequent interests, of the government's intent to retain such power. *See Bowen*, 477 U.S. at 53. In addition, the nature of the statute makes clear that even if it were construed as an "easement," it would be a robust easement defined by federal law, not common law, and subject to the continuing exercise of reserved federal rights.

Petitioners do not contest that they acquired their interest in their land "subject to" an existing 1875 Act right-of-way. They therefore also took their interest "subject to" Congress's reserved right to modify the railroad grant. At a minimum, this reserved right persists as long as Congress identifies a legitimate transportation purpose for the right-of-way, regardless of who is deemed to own the land underneath the right-of-way.

Both 43 U.S.C. § 912 and 16 U.S.C. § 1248 were permissible amendments by Congress governing the use and disposition of 1875 Act rights-of-way. The conversion of the Wyoming right-of-way to a trail in this case fell within this authority and properly exercised a right the government had reserved. Based on the text of the governing statutes, the Tenth Circuit's decision in favor of the United States should be affirmed.

B. Because The 1875 Act And Pre-1871 Right-Of-Way Grants Use Similar Or Identical Language, The 1875 Act Also Should Be Construed To Retain Government Ownership In Fee Of The Land Underlying A Right-Of-Way Grant

1. The 1875 Act Uses Substantially The Same Granting Language As Pre-1871 Right-Of-Way Grants

"[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read 'as if they were one law.'" *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006); *accord Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010). If a legislature intends to depart from a longstanding practice, courts will generally require it to clearly signal its intent in the language of the statute. *See, e.g.*, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 683 (2006) (requiring a "clear signal from Congress" before treating claims "ordinarily resolved in state courts" as "arising under" federal jurisdiction).

The text of the 1875 Act is functionally identical to all significant right-of-way grants from before 1871. Nothing in the text of the 1875 Act clearly indicates any intent by Congress to depart from its previous practice. In the right-of-way granting section of the 1875 Act, Congress used the following language:

> "The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory . to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road." 43 U.S.C. § 934.

The *Great Northern* Court construed this language as evincing a "clear" congressional intent to grant an "easement" right-of-way that granted no mineral rights to railroads. It cited Congress's use of the terms "the" right-of-way "through" the public lands as signs of this intent. *Great Northern*, 315 U.S. at 271. However, virtually identical terms are used in the 1862 Pacific Railroad Act:

> "[T]he right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over

> the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations." 12 Stat. 489, § 2.

This language was construed by the Court to grant a "limited fee" with an "implied right of reverter" to the United States. *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) (construing the 1864 Northern Pacific Railroad Act as such); *Great Northern*, 315 U.S. at 273 n.6 (identifying the 1864 Northern Pacific Act, the 1862 and 1864 Pacific Railroad Acts, and the 1850 Illinois Central Railroad Act as "limited fee" grants).

The Illinois Central Railroad Act,[6] which inaugurated the 1850-to-1871-era policy of granting certain railroads both a checkerboard land grant subsidy and a federally granted right of way, used similar language:

> "[T]he right of way through the public lands be, and the same is hereby, granted to the State of Illinois for the construction of a railroad . . . with the right also to take necessary materials of earth, stones, timber, etc., for the construction thereof: *Provided*, That the right of way shall not exceed one hundred feet on each side of the length thereof . . ." 9 Stat. 466, § 1.

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[6] Illinois Central Railroad Act of Sept. 20, 1850, 9 Stat. 466.

This language, however, also was used in many pre-1871 right-of-way grants that did *not* grant checkerboard subsidy lands to the railroads.[7] In 1852, for example, Congress passed its first "general railroad right of way act," a direct predecessor of the 1875 Act:

> "[T]he right of way shall be, and is hereby granted to all rail and plank road, or Macadamized turnpike companies . . . over and through any of the public lands of the United States . . . and the said company or companies are hereby authorized to survey and mark through the said public lands, to be held by them for the track of said road, one hundred feet in width . . . *And be it further enacted*, That the said company or companies shall have the right to take from the public lands, in the vicinity of said road or roads, all such materials of earth, stone, or wood, as may be necessary or convenient, from time to time, for the first construction of said road or roads, or any part thereof, through said land." Act of Aug. 4, 1852, 10 Stat. 28, §§ 1, 2.

This right-of-way-only, pre-1871 statute further indicates the consistency and unity of congressional practice with respect to right-of-way grants. The 1852 Act was cited as precedent for the

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[7] Petitioners fail to acknowledge that Congress gave many right-of-way-only grants prior to 1871. *See* Pet'rs' Br. at 2-3, 20-21 (describing Congress's grants as comprising rights-of-way and "alternating sections" from 1850 to 1871, and right-of-way grants thereafter).

1862 Pacific Railroad Act.[8] In turn, both the 1852 Act and the 1850 Illinois Central Railroad Act derived from various right-of-way granting statutes in the 1830s, the dawn of railroading in North America. These grants were for rights-of-way only and did not include checkerboard land subsidies. The text of a grant to the New Orleans and Nashville Railroad in 1836 looked very similar to that used for the rest of the century:

> "[T]here be, and is hereby granted . . the right of way through such portion of the public lands as remain unsold, *Provided*, That the portion of the public lands occupied therefor, shall not exceed eighty feet in breadth . . . *And be it further enacted*, That for such depots, watering places and work-shops as may be essential to the convenient use of the said road; there shall also be granted to the said company, such portions of the public land [of five acres, for every fifteen miles] . *And be it further enacted*, That so long as the public lands in the vicinity of the said road shall remain unsold, the said company shall have power to take therefrom, such materials of earth, stone, or wood, as may be necessary for

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[8] *See* Cong. Globe, 37th Cong., 2d Sess., 2676 (June 12, 1862) (citing the 1852 Act, but with a typographical error stating the "law approved 4th of August, 1854," rather than 1852); *see also* debates on the Pacific Railroad Act at Cong. Globe, 1579-80 (Apr. 8, 1862); 2675-77 (June 12, 1862); 2778-80 (June 18, 1862).

the construction of the said road[.]" Act of July 2, 1836, 5 Stat. 65, §§ 1, 2, 3.[9]

There is no obvious textual basis to conclude that these very similar statutes granted different property interests before and after 1871. The presumption should be that they granted the same type of right-of-way, one that preserved an ownership and control interest in the United States. *See, e.g.*, *Townsend*, 190 U.S. 267 (construing the 1864 Northern Pacific right-of-way grant to retain an "implied right of reverter" in the United States); *see also United States v. Union Pac. R.R. Co.*, 353 U.S. 112 (1957) (construing the 1862 Union Pacific right-of-way grant as a "limited fee" in the surface that did not convey mineral rights to the railroads). As described below, this is consistent with the legislative history of these statutes.

2. The 1875 Act Incorporates By Reference The 1864 Act's Right-Of-Way Condemnation Authority, Suggesting That Both Acts Were Intended To Grant Similar Property Interests

Section 3 of the 1875 Act, 43 U.S.C. § 936, authorized a railroad to condemn private property for its right-of-way, but did not set forth the procedures for exercising eminent domain or the type

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[9] *See also* Darwin P. Roberts, *The Legal History Of Federally Granted Railroad Rights-Of-Way And The Myth Of Congress's "1871 Shift,"* 82 U. Colo. L. Rev. 85, 106-13 (Winter 2011) (discussing 1830s right-of-way grants).

of property interest the railroad would acquire. It simply incorporated by reference the condemnation power from the amendatory Pacific Railroad Act of 1864, which had granted condemnation powers to the Union Pacific and Central Pacific Railroads. If Congress intended a "sharp change" in policy in the 1875 Act, it would make little sense to incorporate verbatim the condemnation authority from the right-of-way grant provision in the 1864 Act. As discussed below, the more sensible conclusion is that Congress did not intend to change the government's interests in rights-of-way granted after 1871.

3. Section 4 Of The 1875 Act Does Not Establish That Congress Intended To Divest The United States Of Any Interest In An 1875 Act Right-Of-Way

Petitioners rely on Section 4 of the 1875 Act, 43 U.S.C. § 937, along with *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), and *Great Northern* for the proposition that Congress intended not only to change the nature of an 1875 Act right-of-way from prior enactments, but to alienate any United States interest in the land underlying such a right-of-way to a homesteader or other future patentee. Pet'rs' Br. at 38, 45. Section 4 provides that after the right-of-way has been officially located and noted on the land office plats, "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The text of Section 4 does not establish that Congress intended to dispose of any federal interest

in an 1875 Act right-of-way and the land underneath it. Indeed, *Great Northern* found Section 4 to be ambiguous because it looked to "legislative history" to establish its purported meaning. *Great Northern*, 315 U.S. at 271 n.3. However, *Great Northern* cited not the legislative history of the 1875 Act, but a few lines of debate over an 1872 predecessor statute. *Id.* The Federal Circuit's decision in *Hash*, relying on *Great Northern*'s discussion of this small extract of legislative history, seems to have misinterpreted the context of that debate and drawn historically inaccurate conclusions from it. *See* Roberts, 82 U. Colo. L. Rev. at 118-20, 150-62 (examining in detail the legislative history of Section 4's predecessor statutes; concluding that the statutory language was written by a land grant proponent, and was intended to protect *railroads* from settlers obstructing their rights-of-way without employing the unpopular procedure of administratively withdrawing public lands in the vicinity of the railroad from homesteading and settlement). Section 4 did not address the disposal of any federal interest in the railroad right-of-way, but of other public lands in the vicinity of the right-of-way. It provides no basis for altering the conclusion that the United States retained a fee interest in 1875 Act rights-of-way.

II. The Legislative History Of The 1875 Act Indicates Congress Intended To Reserve Control Over The Rights-Of-Way And Ownership Of The Land Underneath

If this Court determines the text of the 1875 Act is ambiguous as to whether Congress reserved an interest in the rights-of-way, the legislative history plainly reveals that Congress intended to retain

control over the use of 1875 Act rights-of-way, and to retain title to the land underlying such property.

A. During Debates On The 1875 Act, Legislators Stated That The United States Would Own The Land Underlying An 1875 Act Right-Of-Way Even If It Later Disposed Of "All The Other" Public Lands "In The Vicinity Of The Road"

The "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill[.]" *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984)). But there appears to have been no committee report by either the House or Senate on the bill that became the 1875 Act. In the absence of such authority, floor debates on the legislation are relevant. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 580 n.10 (2006) (citing floor debate statements in construing the Detainee Treatment Act of 2005); *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 19-20 (2006) (citing floor debate statements in construing the Hobbs Act of 1946).

The remarks of legislators in floor debates on the 1875 Act make Congress's intentions clear. As explained below, in one of the final House debates before passing the Act, the bill's floor manager explicitly analogized the right-of-way property interests granted by the 1875 Act to those granted by the Pacific Railroad Acts. Under 1875 Act grants, it was stated, the land underlying the rights-of-way would remain in federal ownership, even if the United States alienated the other public lands in the

vicinity of the road—just as with the Pacific Railroad Acts. This is not surprising, because in passing the 1875 Act, Congress was simply continuing the right-of-way granting policy it had been following since the 1830s.

On January 12, 1875, the "territorial railroad" bill was reported back from the House Committee on Public Lands by the committee's chair, Representative Washington Townsend of Pennsylvania, who managed the bill on the House floor.[10] The debate on the bill quickly focused on the respective state and federal powers to regulate railroads receiving federally granted rights-of-way, which led to a discussion of the retained federal interest in a federally granted right-of-way of this type:

> "Mr. G.F. HOAR [of Massachusetts]. I ask my friend from Pennsylvania [Representative Townsend] to hear me a moment in explanation of my point. Suppose after a railroad company has built a railroad under this bill in a Territory a State is formed there, through whose territory the road passes. Now, what would be the condition of the road-bed? *It is a tract of land owned by the United States, over which a railroad under the authority of the United States passes.* Now, if the State undertakes to meddle with that location, it is

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[10] In *Great Northern*, this Court cited other remarks by Representative Townsend from the same debate as evidence of Congress's "intent" to grant an easement. *Great Northern*, 315 U.S. at 274 n.8 (citing Cong. Rec., 43d Cong., 2d Sess., Vol. 3, pt. 1, 404-05 (1875)).

meddling with lands within its limits [which are] the property of the United States, and with a right of way within its limits granted by the United States. *The United States may in the course of years or generations have parted with all its public lands in the State or in the vicinity of the road*, and still, whenever the State undertakes to exercise [its] ordinary local authority . . . the railroad will meet the State with the constitutional objection that *this land you are dealing with is the property of the United States*; the eminent domain did not come from your State to us as in ordinary cases, and the right of way with which we are clothed was given by the United States. In that case the people of the State would either have to come to Congress for a remedy or be without it.

"Mr. TOWNSEND. *Is not that the condition in which the Union Pacific Railroad stands in Kansas and has stood, and in California too?*

"Mr. G.F HOAR. Undoubtedly; [which] I regard as a most lamentable fact ." Cong. Rec., 43d Cong., 2d Sess., 406 (Jan. 12, 1875) (emphases added).[11]

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[11] *See also Union Pac. R.R. Co. v. Peniston*, 85 U.S. 5, 50 (1873) (in railroad taxation case, holding that, in addition to the exemption from state taxation for operations on the Union Pacific's 1862 right-of-way, "[t]he estate in the soil [under the right-of-way] cannot be taxed, for that remains in the United States").

These statements confirm that the legislators who passed the 1875 Act believed the United States would retain ownership of the land underlying these federally granted railroad rights-of-way, as it had with the earlier Pacific Railroad Acts. Moreover, the legislators had this understanding even though the bill also was described, in the same debate, to be granting the railroads only "the right to lay their tracks and run their trains over the public lands[.]"[12] *Great Northern* did not cite or analyze this highly relevant legislative history, and neither do Petitioners.

Applying the legislative history of the 1875 Act and this Court's precedent with respect to pre-1871 federally granted railroad rights-of-way, the United States retained ownership of the land underlying the right-of-way in Wyoming. For this reason as well, the judgment of the Tenth Circuit should be affirmed.

B. The Legislative History Of The 1875 Act Emphasized That The Purpose Of Railroad Right-Of-Way Grants Was To Benefit The Public As A Whole

The Court's construction of the 1875 Act also should be informed by Congress's purpose in passing that Act. In *Leo Sheep Co.*, the Court reviewed several rules of construction regarding statutory grants to railroads. The Court recognized "the familiar canon of construction that, when grants to

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[12] Cong. Rec., 43d Cong., 2d Sess., 407 (Jan. 12, 1875) (comment of Mr. Hawley of Illinois).

federal lands are at issue, any doubts are resolved for the Government not against it.'" *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979) (citing *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978)). Nonetheless, the Court also noted that it "long ago declined to apply this canon in its full vigor to grants under the railroad Acts." *Id.* Instead:

> "The solution of [ownership] questions [involving the railroad grants] depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Id.* at 682 (bracketed material theirs) (quoting *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618, 625 (1885)).

Petitioners suggest that "*Leo Sheep* is dispositive of the question presented." Pet'rs' Br. at 38. Essentially, they argue that the checkerboard subsidy lands at issue in *Leo Sheep Co.* should be treated in exactly the same way as a federally granted right-of-way. Pet'rs' Br. at 39-40. But there was a great difference in congressional intent regarding the checkerboard subsidy lands at issue in *Leo Sheep Co.*, and the federally granted rights-of-way at issue in cases like *Townsend*, *Great Northern*, and the instant case. The checkerboard land grants,

though vast in their scope and influence on the history of the American West, were merely a means to subsidize the construction of railroads (including, in several cas across the entire continent). In contrast, Congress repeatedly emphasized that its intent and purpose in making railroad right-of-way grants was to expand transportation to benefit the public. As noted above (*supra* at 8), in the Union Pacific Railroad Act of 1862 at issue in *Leo Sheep Co.*, Congress stated that its purpose was "to promote the public interest and welfare by the construction of said railroad," to "keep[] the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes[.]"[13] This provision was cited as one of the reasons the "interests of Government" were "carefully protected" by the law.[14]

For that reason, the more important holding of *Leo Sheep Co.* for the instant case is that railroad grants should be construed to "carry out the intent of Congress look[ing] to the condition of the country when the acts were passed, as well as to the purpose declared on their face[.]" *Leo Sheep Co.*, 440 U.S. at 682. The public purpose of promoting transportation from one end of the right-of-way to the other, and to points along it, would in no sense depend on whether the public retained future access to the even-numbered sections of public land not granted to the Union Pacific, or the Union Pacific's disposition of the odd-numbered sections that were granted to

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[13] Pacific Railroad Act of July 1, 1862, 12 Stat. 489, § 18.

[14] Cong. Globe, 37th Cong., 2d Sess., 1580 (1862).

subsidize the railroad, often many miles from the actual track. But the public's interest and control over the use of the *right-of-way* would be critically important. For that reason, *Leo Sheep Co.*'s holding that no rights were impliedly reserved to cross the checkerboard lands should not control the outcome of this case.[15]

The legislative history of the 1875 Act confirms that, as with the Pacific Railroad rights-of-way, Congress's purpose was to benefit the public by promoting transportation. In an 1874 debate on the legislation that would become the 1875 Act, a senator stated: "We are not creating railroads for the benefit of railroad companies; we are creating railroads for the benefit of the public."[16] The legislative history of the 1875 Act also shows that Congress further intended to protect the public interest by explicitly retaining the right to "alter, amend, or repeal" the legislation in order to "reserve[] the right of Congress to alter or amend [the grant] in any manner it may choose."[17] Consistent with these statements, the Court recognized the fundamental public purpose

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[15] Indeed, during a century in which the constitutionality of any government funding for "internal improvements" was a subject of serious debate (*see Leo Sheep Co.*, 440 U.S. at 671-72), the direct transfer of vast amounts of public land to a railroad corporation could not possibly have been seen as legally justified unless the essential purpose of the project was to benefit the public, not the corporation.

[16] Cong. Rec., 43d Cong., 1st Sess., 3030 (Apr. 13, 1874) (remarks of Sen. Thomas Bayard of Delaware).

[17] Cong. Rec., 43d Cong., 2d Sess., 406 (Jan. 12, 1875).

underlying the 1875 Act in *United States v. Denver & Rio Grande Railway Co.*, 150 U.S. 1 (1893). The Court held the 1875 Act "was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement and in enhancing the value of those public lands through or near which such railroads might be constructed." *Id.* at 8. Consistent with *Leo Sheep Co.*, a holding in favor of the government in this case would allow the rights-of-way to continue to be used for transportation for the benefit of the public, as intended when they were created out of the federal public lands.

III. There Is No Support In The Legislative History For Petitioners' Conclusion That Congress Surrendered Any Federal Interest In Rights-Of-Way Granted After 1871

Petitioners rely heavily on *Great Northern*'s analysis of Congress's intentions in the early 1870s. *Great Northern* concluded Congress made a "sharp change" in policy after 1871, because it did not wish to grant to railroads mineral rights in their rights-of-way. But Petitioners' attempt to extend *Great Northern*'s holding to government interests in 1875 Act rights-of-way relies on two problematic interpretations of the legislative history.

First, Petitioners, like *Great Northern*, describe the legal history of federal grants to railroads as consisting of two phases: the first from 1850 to 1871, involving "railroad land grants," and the second "after 1871," when Congress supposedly

"changed its policy in favor of homesteaders" and thereafter granted only rights-of-way to railroads. Pet'rs' Br. at 2-3; *Great Northern*, 315 U.S. at 273-74. But selecting 1850 as the first year of relevant history is inherently misleading if the issue concerns the government's rights in a right-of-way. As the right-of-way statutes cited above indicate, federal right-of-way grants began in the 1830s, well before any railroad received a checkerboard subsidy land grant, and used substantially consistent language through the 1870s and beyond. Meanwhile, between 1850 and 1871, Congress awarded some, but not all, railroads subsidy land grants *in addition* to right-of-way grants. Thus, federal right-of-way law developed before land grants to railroads and existed in parallel to the land grants. Right-of-way law was not merely a subpart or after-effect of the railroad subsidy land grant policy. *See* Roberts, 82 U. Colo. L. Rev. at 105-22 (describing the independent development of the right-of-way granting policy and the subsidy land grant policy).

Second, *Great Northern* suggested that because the last checkerboard subsidy land grants to railroads passed Congress in 1871, Congress thereafter deliberately and collectively shifted to a policy of opposing "land grants" to railroads, including mineral rights in railroads' right-of-way grants. *Great Northern*, 315 U.S. at 273-74 (citing House Resolution of Mar. 11, 1872, and debates about bills "granting no lands"). Petitioners rely on *Great Northern*'s sources to argue that Congress also intended to retain no government interest in post-

1871 rights-of-way. *See* Pet'rs' Br. at 3-4. But Petitioners fail to acknowledge the fact that subsidy land grant legislation remained a subject of active controversy throughout the 1870s, and that the congressional discussions about "granting no lands," cited from the early 1870s, were still focused on subsidy land grants to railroads, *not* a changed government interest in rights of way.

By the late 1860s, the public came to resent not only the vast quantity of lands the railroads actually received, but the government's routine practice of temporarily "withdrawing" even greater swaths of land from eligibility for homesteading, to allow the railroads to select the most attractive tracts without interference from individual farmers. Even so, the railroads still maintained substantial support in Congress, and checkerboard subsidy land grants to railroads became the subject of an intense political struggle from the late 1860s through the early 1870s. *See* Roberts, 82 U. Colo. L. Rev. at 118-20, 126-41 (describing the political struggle).

As late as 1873, bills were still being introduced to grant railroads both rights-of-way and subsidy lands. It became clear only in retrospect that 1871 was the turning point, after which opponents in Congress successfully voted down all bills that included subsidy land grants. Throughout this period, however, Congress continued to pass numerous bills that granted only a railroad right-of-way, in the same form that had been passing since the 1830s. What changed in 1871? After 1871, bills

that would have granted both checkerboard subsidy lands and rights-of-way failed, but right-of-way-only bills continued to pass. There was no congressional shift to a new right-of-way policy somehow favoring homesteaders; Congress merely ceased to pass right-of-way bills if they also included land grants to railroads. *See* Roberts, 82 U. Colo. L. Rev. at 130-41.

Because *Great Northern* characterized this gradual, contested discontinuation of land grants as an affirmative "sharp change" in favor of homesteaders, its portrayal of the 1875 Act's legislative history unfortunately invites misleading conclusions, of the sort advanced here by Petitioners, and by the Federal Circuit in *Hash*. *Great Northern* cited numerous congressional debates from the early 1870s, on right-of-way bills predating the 1875 Act, in which legislators stated that those particular right-of-way bills would "grant no lands," as evidence Congress intended to grant no mineral rights to railroads in their rights-of-way. But those debates were focused on distinguishing bills that granted *only* rights-of-way from bills that would grant *both* subsidy lands and rights-of-way. Contrary to Petitioners' arguments, legislators were not declaring that right-of-way bills would grant a different, diminished *government* property interest from rights-of-way granted in earlier decades by legislation using identical language. *See, eg.*, Pet'rs' Br. at 20-21, 34-38 (citing *Great Northern* and *Hash*); *cf.* Roberts, 82 U. Colo. L. Rev. at 150-62 (reviewing in detail the 1875 Act's legislative history).

Again, the legislative history of the 1875 Act itself also does not support the conclusion that Congress intended to relinquish any interest in the

lands underlying 1875 Act rights-of-way. As described above, the debate over the 1875 Act explicitly stated that Congress intended to retain the fee interest in the land underlying an 1875 Act right-of-way, even if it parted with its other public lands in the area.[18] Petitioners fail to acknowledge or address this legislative history, which was not discussed in either *Great Northern* or *Hash*.

Moreover, homesteaders depended on the railroads. As a practical matter, protecting the railroad rights-of-way from encroachment reflected Congress's concern for the economic welfare of homesteaders. Relative to the colossal (and colossally unpopular) checkerboard land grants, the acreage covered by railroad rights-of-way was vanishingly small. It likely would lie under an active railroad—crucial for transportation—for the foreseeable future. There is no legislative history whatsoever indicating that anyone in Congress sought to give homesteaders the fee title to such property.

In sum, Petitioners' conclusion that Congress intended to surrender all interest in its post-1871 rights-of-way is faulty. It is inaccurately premised on *Great Northern*'s analysis, which only decided the issue of mineral rights, and did not resolve the issue of whether Congress intended to change the government's interests in federally granted railroad rights-of-way. Petitioners' arguments should be rejected.

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[18] *See* Cong. Rec., 43d Cong., 2d Sess., 406 (Jan. 12, 1875).

IV. Congress Intended, Both Before And After 1871, To "Appropriate" Rights-Of-Way From The Public Domain And Classify Them As Robust "Easements" Under Federal Control, With Title And Mineral Rights Remaining In The United States

The true nature of Congress's right-of-way grants to railroads has been obscured by the use and discontinuance of terms like "limited fee" and a mistaken notion of an 1871 shift in right-of-way policy. But reviewing the grants and their legislative history from the 1830s through 1875 paints a reasonable, consistent picture. Federally granted railroad rights-of-way were robust railroad easements under federal law, not common law; they were "appropriated" from the public lands by the grant, removing them from the category of lands available for later settlement; they were granted for the benefit of the public, not the railroad; and Congress intended for the United States to own the underlying lands and the mineral rights therein, with Congress controlling the disposition of the property if abandoned. At least three lines of evidence support this understanding.

First, Congress used "right of way" as its definitional term for the granted property. To the extent it described what it meant by that term, it characterized its right-of-way grants as a type of easement or similar property. *See, e.g.*, Roberts, 82 U. Colo. L. Rev. at 110-11, 116, 122-23 (discussing grants and bills from the 1830s through the 1850s). But there is no indication that Congress intended the rights-of-way to be mere common-law

easements. Instead, Congress's view, expressed in the legislative history of various grants, was that the rights-of-way would be defined by federal law, and that the land underneath the rights-of-way would remain in United States ownership.

Second, this is consistent with the "appropriation doctrine" of public lands, which dates to the 1830s. *See Wilcox v. Jackson*, 38 U.S. 498 (1839) (announcing the principle underlying the "appropriation doctrine"). Under this doctrine, public lands that were legally "appropriated" for some purpose, including a railroad right-of-way, were deemed to have been taken out of the category of public lands available for acquisition under other laws, including the Homestead Act of 1862. *See, e.g.*, *Townsend*, 190 U.S. at 269-71 (holding that a right-of-way grant to the Northern Pacific appropriated the right-of-way land for that purpose, even if a homestead patent later issued that nominally covered the same land). If, as the *Townsend* Court held, federally granted rights-of-way constituted "appropriations" of the public lands, no person could subsequently acquire an interest in such lands.

Third, Congress saw fit to "appropriate" public lands for the rights-of-way because the right-of-way grants were made with the primary intention to benefit the public, not the railroad. Congress did not intend to grant railroads a fee interest in the right-of-way property or the rights to the minerals underlying the rights-of-way.[19] Nevertheless,

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[19] *See* Roberts, 82 U. Colo. L. Rev. at 111, 122 (discussing congressional statements that railroads would not acquire fee interests or mineral rights in rights-of-way).

Congress wanted the ability to ensure that the right-of-way property would remain available for public benefit if needed, even if abandoned by a railroad. For that reason, ultimate control and title were retained by the United States. Congress understood and intended that the lands appropriated for the rights-of-way would revert to full government ownership and control if the railroads ceased to use them. When Congress passed laws in 1906, 1909, and 1921 regulating the disposition of abandoned or never-constructed rights-of-way, it first reasserted its ownership of the property before prescribing what should happen to it.[20]

This view of Congress's enactments unifies this Court's holding in *Townsend*—that the right-of-way grants "appropriated" the public lands for the railroads—with this Court's holdings in *Great Northern* (1942) and *United States v. Union Pacific Railroad Co.* (1957) that neither the Pacific Railroad rights-of-way nor the 1875 Act rights-of-way conveyed mineral rights to the railroads. It only requires the Court to hold that Congress intended the government's rights in a federally granted railroad right-of-way to be consistent both before and after 1871, a conclusion that is supported by both the text of the 1875 Act and its legislative history.

CONCLUSION

This Court should hold that Congress's reserved right to "alter, amend, or repeal" the 1875 Act, combined with its subsequent legislation,

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[20] *See* Roberts, 82 U. Colo. L. Rev. at 146-49 (discussing 43 U.S.C. §§ 940 and 912).

authorizes the use of 1875 Act rights-of-way for alternative transportation purposes regardless of who owns the land underneath. Even if the text of the statute were not clear, this Court should further hold that the 1875 Act's predecessor statutes and legislative history indicates that Congress intended to retain control over 1875 Act rights-of-way and ownership of the land underneath, just as it had with rights-of-way prior to 1871. The Court should affirm the judgment of the Tenth Circuit.

RESPECTFULLY SUBMITTED.

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE NORTHWEST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2(a), Northwest Legal Foundation submits this brief amicus curiae in support of Petitioners Marvin M. Brandt Revocable Trust and Marvin M. Brandt (Brandt).[1]

The Northwest Legal Foundation was established in 1988 for the purpose of stopping government abuse of citizen's rights, specifically focusing on property rights.[2] The Northwest Legal Foundation strongly

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Robert Hale, a founding member of the Northwest Legal Foundation, has personally or through the Foundation asserted property rights or limited government in numerous actions, including *Hale v. State of North Dakota*, 2012 ND 148, ¶ 35, 818 N.W.2d 684, 696, *cert. denied*, 133 S.Ct. 847 (2013); *Gowan v. Ward County Commission*, 2009 ND 72, 764 N.W.2d 425, *cert. denied*, 558 U.S. 879 (2009); *City of Seattle v. McCoy*, 101 Wash.App. 815, 4 P.3d 159, Wash.App. Div. 1 (2000) (amicus brief filed by Northwest Legal Foundation involving decision of lower court to prevent property owners from using property vacated, appellate court holding (1) drug nuisance statute was unconstitutional taking of property as applied to owners; (2) common-law nuisance exception did not apply to the otherwise compensable taking; and (3) drug abatement statute violated due process as applied); *Richmond v. Thompson*, 130 Wash.2d 368, 922 P.2d 1343 (1996) ("Northwest Legal Foundation and other amici ask this court to recognize a common law absolute

(Continued on following page)

believes that property rights are fundamental rights that should be recognized as an individual right that is provided the same protections as other fundamental rights.

SUMMARY OF ARGUMENT

The fundamental connection between the protection of individual property rights and liberty interests cannot be denied. This Court has previously recognized that connection and should do so again in this case. More specifically, this Court should start from the premise that an individual's property rights are fundamental and restrict the federal government's ability to take or limit the use of that property without just compensation, as the Fifth Amendment requires.

In this light, this Court should recognize that an individual's property rights are fundamental rights

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privilege for citizen complaints concerning police conduct" – issue not raised below in a timely manner so not decided on appeal); *Postema v. Snohomish County*, 83 Wash.App. 574, 586-587, 922 P.2d 176, 183, Wash.App. Div. 1 (1996) ("Amicus Northwest Legal Foundation argues that RCW 36.70A.210 creates a city-county government in violation of Wash. Const., art. 11 § 16, which provides that '[n]o such "city-county" shall be formed except by a majority vote of the qualified electors voting thereon in the county.' NLF also argues that RCW 36.70A.210 is void for vagueness."); *Cobb v. Snohomish County*, 64 Wash.App. 451, 829 P.2d 169, Wash.App. Div. 1 (1991); *R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989).

that must be protected by the courts and as such this Court should apply strict-scrutiny analysis to any government actions involving the taking of a property right from an individual or any limitation of the use of property by a property owner. In other words, this Court should reject any encumbrance or limit on a person's property unless under the strict-scrutiny analysis, there is a strong and compelling basis for such encumbrance or governmentally imposed limit on the individual's use of his or her property.

This case defines the distinction between private property rights under the law versus the assertion of control of property based on the use of raw force rather than the common law of property rights.

If the judiciary does not resume its proper role as a protector of rights and a limiter of the government and government actions, there is no law or rule of law and the government becomes an instrument of inequity and the facilitator of the denial of the rights of its citizens.

The Northwest Legal Foundation agrees with the assertion made in the amicus brief submitted by the Cato Institute, that the Federal Circuit "got it right" in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005):

> the Federal Circuit held the United States did not retain any "implied" reversionary interest in land encumbered by railroad rights-of-way established under the 1875 Act. Thus,

> under *Hash*, the Brandt family – not the government – owns the land.

Cato Institute Brief, page 20. Implicit in the Federal Circuit ruling is the reality that the powers of government, and particularly the federal government, are limited. By the same token, the rules that apply to everyone else should apply equally to the federal government, particularly in relation to property rights and the requirement under basic real property law that any transfer of property rights must be explicit and not implied. An individual's property rights should be recognized as a fundamental interest deserving the application of strict-scrutiny analysis, or at the very least heightened scrutiny.

ARGUMENT

I. Property Rights are a Fundamental Right Retained by Individuals

"Property ownership and political liberty have long been linked in Anglo-American constitutional thought." James W. Ely, Jr., *Property Rights and the Supreme Court in the Gilded Age*, 2013 Vol. 38, No. 3 JOURNAL OF SUPREME COURT HISTORY 331 (forthcoming publication Dec. 2013). Indeed, a citizen's right to be secure in the ownership of his or her property is one of the primary purposes behind the formation of our national government. According to Professor Ely, United States Supreme Court cases demonstrate a long history of protecting property rights and

engender two primary themes: first, "the protection of private property [serves] as a means to uphold individual liberty against governmental overreaching," and second, "this commitment to liberty [is] reinforced by a second theme, the importance of secure property rights as the basis for economic growth." *Id.*; see generally James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT – A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS, 2d ed., Oxford University Press (1998).

An individual's right to property is a fundamental right. Justice Alito recently described "fundamental rights" as rights and liberties that are deeply rooted in our Nation's history and tradition and implicit in the concept of ordered liberty that without such right liberty or justice would not exist.[3] The rights of

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[3] Justice Alito stated

> But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (referring to fundamental rights as those that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental"), as well as "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, *supra*, at 721, 117 S.Ct. 2258 (quoting *Palko v. Connecticut*, 302 U.S. 319 (1937)).

U.S. v. Windsor, ___ U.S. ___, 133 S.Ct. 2675 (2013) (Alito, J., dissenting).

(Continued on following page)

an individual to own property, possess property, and be safe from intrusions and limits upon the ownership and use of property are the hallmark of our country.

The review of the law conducted by Professor Ely, along with his citation to this Court's early decisions relating to property as a right that is part and parcel to individual rights, is superbly described in his May 2012 paper (which is being published this December in JOURNAL OF SUPREME COURT HISTORY). Significantly, Professor Ely demonstrates that the individual's property rights are "deeply rooted in this Nation's history and tradition," are "rooted in the traditions and conscience of our people as to be ranked as fundamental," and that these important rights are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *See* cases cited and language quoted in *U.S. v. Windsor*, *supra* footnote 2.

According to Professor Ely, the rights relating to property are linked to liberty itself:

> Since the time of Magna Carta respect for private property set the bounds of legitimate government. Political dialogue associated liberty and property rights during the colonial era. "Liberty and property are not only

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We note that this Court recently analyzed whether the right to bear arms is a fundamental right in *McDonald v. City of Chicago, Ill.*, ___ U.S. ___, 130 S.Ct. 3020 (2010), at Part III, at 3036-3042, finding that it is a fundamental right.

> join'd in common discourse," a correspondent observed in the Boston Gazette in 1768, "but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other."[4]

Any attempt to separate liberty and property in the original American scheme of political thought would be improper:

> The founding generation saw liberty and property as inseparable. "Property must be secured," John Adams succinctly proclaimed, "or liberty cannot exist."[5] By defending the rights of property owners the Court in the late nineteenth century followed this well-marked path and sought to safeguard individual liberty by curtailing the reach of government.[6]

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[4] Ely's Footnote 7, citing Boston *Gazette*, February 22, 1768, p. 1.

[5] Ely's Footnote 8, citing "Discourses on Davila," in Charles Francis Adams, ed., *The Works of John Adams* 10 vols. (Boston: Little, Brown, vol. 6, 1851), 280.

[6] Ely's Footnote 9, citing Owen M. Fiss, *History of the Supreme Court of the United States, Volume 8: Troubled Beginnings of the Modern State, 1888-1910* (New York: Macmillan, 1993), 389 ("Liberty was the guiding ideal of the Fuller Court, the notion that gave unity and coherence to its many endeavors."); Michael J. Phillips, *The Lochner Court: Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Westport, Conn.: Praeger, 2001), 115 ("From all this, one might conclude that the justices' motives aligned with their words: that they were trying to protect liberty and property against government actions that would deprive people of either or both.").

Significantly, the Justices of this pre-New Deal period recognized in the Court's opinions the importance of property as a mainstay to liberty itself:

> Leading justices . . . repeatedly articulated the view that property was essential for the enjoyment of individual liberty. In contrast to post-New Deal jurisprudence, the justices believed that property and other rights were interdependent. Justice Stephen J. Field, whose long and influential career on the Court can be seen as an exploration of the meaning of liberty,[7] best summarized this relationship between rights in an 1890 address: "It should never be forgotten that protection of property and person cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain."[8] . . . Members of the Court regularly equated property and liberty. For instance, Field pointedly insisted that the Fourteenth Amendment "places

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[7] Ely's Footnote 10, citing Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence, Kansas: University Press of Kansas, 1997).

[8] Ely's Footnote 11, citing Stephen J. Field, "The Centenary of the Supreme Court," February 4, 1890, reprinted in 134 U.S. 729, 745.

> property under the same protection as life and liberty."[9]

James W. Ely, Jr., *Property Rights and the Supreme Court in the Gilded Age*, 2013 Vol. 38, No. 3 JOURNAL OF SUPREME COURT HISTORY 332 (forthcoming publication Dec. 2013).

The entire purpose of a fundamental right, and the recognition of a fundamental right, is to protect citizens from government overreach.

II. An Impediment or Encumbrance by the Government on a Person's Property Rights Should Engender Either Strict Scrutiny or at the Very Least a Heightened Scrutiny

The federal government was explicitly created as one of limited powers. Indeed, the Framers of the Constitution took the time to list specific enumerated powers in Article I, Section 8. Moreover, ratification of the new Constitution was initially thwarted by the arguments of the Anti-Federalists until there was a consensus that upon ratification a Bill of Rights would be proposed by the First Congress as a limit on the federal government's powers. Twelve amendments were proposed by Congress in 1791, ten of which were ratified and became our Bill of Rights.

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[9] Ely's Footnote 13, citing *Munn v. Illinois*, 94 U.S. 113, 141 (1877) (Field, J., dissenting).

This constitutional history clearly indicates that the Framers and the states that ratified the Constitution intended that the federal government would be a limited federal government, not only by the powers explicitly conferred on that new government, but also as an additional limiting factor the adoption of the Bill of Rights themselves. And of course, any acts of Congress and any principles employed to interpret the powers of Congress or the Constitution should include, as a starting point, this reality that the powers of the federal government are limited and should be construed accordingly.

This limiting concept should apply also through any application of the due process clause or the equal protection clause applicable to all government entities through the Fifth and Fourteenth Amendments to the Constitution. Unfortunately, many courts (including this one) have failed to apply this basic concept of limited government and have instead countenanced numerous government actions and takings through the application of the "rational-basis test." The rational basis test is in actuality inherently *irrational* in that it relegates complete discretion to the governmental entities. Such deference to the government action negates not only the limited role of government itself and the federal government in particular; it also concomitantly negates the inherent rights of individuals, including property rights. Simply put, the rational basis test protects the government instead of its citizens.

This Court should recognize that an individual's property rights are fundamental rights that must be protected by the courts and as such this Court should apply strict-scrutiny analysis to any federal government actions involving the taking of a property right from an individual or any limitation of the use of property by a property owner. In addition, any encumbrance or limit on a person's property should be rejected unless under the strict-scrutiny analysis, there is a strong and compelling basis for such encumbrance or governmental imposed limit on the individual's use of his or her property.

This case defines the distinction between private property rights under the law versus the assertion of control of property based on the use of raw force rather than the common law of property rights. If the judiciary does not resume its proper role as a protector of rights and a limiter of the government and government actions, there is no law or rule of law and the government becomes an instrument of inequity and the facilitator of the denial of the rights of its citizens.

III. The Statute of Frauds and Other Similar Legal Principles that Require Any Transfer of Real Property Interests Should Apply Equally to All, Including the Government

A fundamental aspect of property law is the requirement that property cannot be transferred except through a valid writing that is explicit and provides

unambiguous terms. Ownership of property must be clear and not subject to confusion or unexpected reversions of interest. An individual's right to use his or her land should not be subject to the whims of the government or the vagaries of quixotic legal theories.

Professors Hovenkamp and Kurtz provide a concise overview of the development the requirement of transfer of real property or real property interests in writing in Principles of Property Law (Hornbook Series 6th ed. 2005). The requirement of writing for any corporeal property transfer or noncorporeal transfer of a lesser property interest (such as reversions, remainders or easements) has existed in the common law since 1433. Moreover, this common law is considered part of American common law because the English legal framework existed and was applied at the time of the American Revolution. *Id.* at 559.

Under English common law, from 1066 to about 1433, transfer of property was effectuated by feoffment in which physical possession of corporeal property was transferred by the feoffer handing a piece of the property (a twig or a piece of the land itself) to the feoffee and verbally stating that he is transferring the land, and then walking off the land leaving the feoffee in possession. Hovenkamp & Kurtz, at 559 and 562. Beginning around 1433, incorporeal property interests were employed, such as reversions, remainders and easements, which were allowed without the transfer of physical possession. *Id.* at 560 and 562. Importantly, any such "use" of the property still owned by another must "'lie in grant,' which meant **they could**

be transferred only by a deed." *Id.* at 560 (emphasis added). Such deeds were enforced in equity courts. *Id.* at 562.

In 1535 Parliament passed the Statute of Uses. Transfer of property interests were by this time common and were effectuated by a **written** conveyance, although this was not at that point an absolute requirement or *sine qua non* of a transfer. *Id.* at 561. However, the absolute requirement of a transfer of real property interest be made in writing came about in 1677 by the passage of the Statute of Frauds; from that time forward, courts required "a writing to give effect to the conveyance of a freehold." *Id.* at 568.

In this case, there is no express reservation of a reversionary interest in the instrument reflecting the transfer to the Brandts. That instrument carves out several rights of way and states that "the easement traversed shall terminate" if unused for five years. Pet. App. at 78. It further provides that the transfer is

> SUBJECT TO those rights for railroad purposes as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns by permit Cheyenne 04128 under the Act of March 3, 1875, 43 U.S.C. 934-939.

Id.

This Court has construed the railroad's interests arising under transfers made pursuant to the 1875 Act "as conveying nothing but an easement." *Great*

Northern Ry. Co. v. United States, 315 U.S. 262, 276 (1942). That holding rests on a thorough consideration of the 1875 Act's text, history, and purposes and its subsequent construction by the United States. See also *Samuel C. Johnson 1988 Trust v. Bayfield County*, 649 F.3d 799, 801-805 (7th Cir. 2011).

It is likewise well-established that "the termination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement." *Samuel C. Johnson 1988 Trust*, 649 F.3d at 803, citing *Restatement (Third) of Property: Servitudes* § 7.4 comments a, c, f (2000). To defeat this core principle of real estate law, an implicit reservation will not do. It won't do for a private party, and the same should be true for the federal government. Cf. *Leo Sheep Co. v. United States*, 440 U.S. 668, 679 (1979) ("Given the existence of . . . explicit exceptions [in the Union Pacific Act of 1862], this Court has in the past refused to add to this list by divining some 'implicit congressional intent.'").

Otherwise an "implicit" conveyance is nothing more than a taking by the government. Moreover, if the legal justification for the use or taking of the property (i.e., allowing an easement for a railroad) no longer exists, then this Court's affirmance of such a taking by the government is in reality a taking by brute force under the façade of a dubious legal process.

Where there is indeed a proper use and proper government interest in the taking of private land, the

law provides a method and important protections through the use of eminent domain. This process ensures not only just compensation through due process, but also requires that the public use is indeed a public use worthy of such a transgression upon the private rights of an owner of property. If the federal government has the authority to "take back" land not through an explicit grant or reversion but instead by implication of a continued easement created through a century-old statute where the specific use no longer exists (and the easement or rationale for the encumbrance has been abandoned is allowed in this case), there is no law.

IV. This Court Should Reject Any Argument which Allows an Implicit Reversion of Property Interests to the Government and Adopt the Converse Position that Any Reversion of a Property Right to an Original Owner Must be Explicitly Retained in the Original Transfer of a Property Interest, Particularly if the Grantor is the Government

Where a government is designed at the outset to be one of limited powers, and where individuals are explicitly provided individual rights – including the right to own, retain, possess, use, and control property – the use of any implicit transfer of an individual's right of property should be rejected. An implicit transfer of property rights is antithetical to literally hundreds of years of property law. Moreover,

the granting of such secret and unexpected powers inured within the federal government is just as antithetical to the original foundation of a limited federal government and the protections provided to its citizens through the amendments to the Constitution.

In this case, an implied reversionary interest cannot be conjured out of the presumption that doubts regarding the meaning of grants of federal lands are to be resolved in favor of the government. The federal government's assertion of such a reversionary interest does not, standing alone, give rise to a doubt that would then be construed in its favor. That would be nothing more than rank boot-strapping.

More to the point, this Court has explained that it "long ago declined to apply this canon in its full vigor under the railroad Acts." *Leo Sheep Co.*, 440 U.S. at 682. Instead, the applicability of the presumption depends on the language of the Act involved. And, this Court resolved any such doubts in *Great Northern*, when it characterized the railroad's interest as an easement.

Leo Sheep is instructive for several more reasons. First, this Court rejected the government's assertion of an easement by necessity. As this Court explained, even an easement by necessity allowing for a right of passage through another's property would not clearly include "the right to construct a road for public access to a recreational area." 440 U.S. at 679. Moreover, the government has no need for an easement by necessity because it has the power of eminent domain; if it

needs something it can condemn it and pay for it. *Id.* at 679-80.

This Court's rejection of an easement by necessity in *Leo Sheep* suggests that the asserted reversionary interest for discretionary purposes should also be rejected. After all, an allegedly necessary property interest is more deserving of protection than one that would just be nice to have. Further, if the right of passage does not include a road, the railroad right of way should not be turned into a general recreational feature. Cf. *Toews v. United States*, 376 F.3d 1371, 1376 (2004) (deeming it "beyond cavil" that turning the right of way into a recreational trail is a different use from that "made by a railroad, involving tracks, depots, and the running of trains.").

Although the government retains the right to take private land through its power of eminent domain, it does not have the power to take private land through the use of an implicit reversion of an interest fully vested by the private party.

In the application of these principles in this case, the Court should reverse the tenth circuit with instructions that the lower court prohibit the reversion to the government unless the lower court finds an explicit reversionary interest.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Tenth Circuit should be reversed with instructions that the lower court prohibit the reversion to the government unless the lower court finds an explicit reversionary interest.

Dated this 19th day of November, 2013.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
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No. 12-1173

In the
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This case involves the General Railroad Right-of-Way Act of 1875 (1875 Act), under which thousands of miles of rights-of-way exist across the United States. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that 1875 Act rights-of-way are easements and not limited fees with a reversionary interest. Based upon the 1875 Act and this Court's decisions, the Federal and Seventh Circuits have concluded that the United States did not retain an implied reversionary interest in 1875 Act rights-of-way after the federal government conveyed the underlying lands into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would constitute a circuit split. The question presented is:

Did the United States retain an "implied reversionary interest" in a right-of-way created by the 1875 Act rights-of-way after the federal government conveyed the underlying lands into private ownership?

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation and Center for Constitutional Jurisprudence submit this brief amicus curiae in support of Petitioners Marvin M. Brandt Revocable Trust and Marvin M. Brandt (the Brandts). The parties have consented to the filing of this amicus brief.

Pacific Legal Foundation (PLF) was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before this Court in defense of the right of individuals to make reasonable use of their property, and the right to obtain just compensation when that right is infringed. *See, e.g., Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counselor party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Monterey, Ltd., 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF attorneys have also participated as lead counsel in *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), *Rapanos v. United States*, 547 U.S. 715 (2006). PLF attorneys are familiar with the issues surrounding the government's policy of converting abandoned railroad tracks to recreational trails, having participated as amicus curiae in *Presault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective will aid this Court in considering Brandt's petition.

The Center for Constitutional Jurisprudence (Center) is the public interest law arm of the Claremont Institute. The mission of the Claremont Institute and Center are to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the mandate expressed in the Fifth Amendment that private property can only be taken upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases, including *Sackett*, 132 S. Ct. 1367; *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010); *Rapanos*, 547 U.S. 715; and *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises important questions regarding the common law system of property ownership and the certainty of titles in property. The Brandts own an 80-acre parcel of property in fee simple. Pet. at 10. An abandoned railroad right-of-way easement, established under the General Railroad Right-of-Way Act of 1875 (1875 Act),[2] traverses their land. *Id.* at 10-11. The Brandts' title is traceable to a 1976 federal land patent that conveyed full ownership of the tract "subject to those rights for railroad purposes that have been granted to [the railroad company] under the [1875 Act]." *Id.* at 11. According to the common law, the Brandts took title to the property in fee simple subject to the burden of a railroad easement. *Great Northern Railway Company v. United States*, 315 U.S. 262, 271 (1942) ("The Act of March 3, 1875 . . . clearly grants only an easement, and not a fee."). That burden, however, was extinguished upon abandonment, and the Brandts now own their land unencumbered by the right-of-way. *Preseault v. United States*, 100 F.3d 1525, 1545 (Fed. Cir. 1996) (*Preseault II*); *Carney v. Board of County Commissioners of Sublette County*, 757 P.2d 556, 562-63 (Wyo. 1988).

In the decision below, however, the Tenth Circuit repudiated the common law rules of property ownership in favor of a per se rule, holding that the United States—the original grantor of the railroad easement and the Brandts' fee estate—will retain an "implied reversionary interest" in an 1875 Act right-of-way, even after the government patents the

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[2] 43 U.S.C. § 934 (1875) (repealed by 90 Stat. 2793 (1976)).

underlying land and conveys it to a private party without any express reservation of reversionary rights. Pet. Cert. App. at 3-6, 18-21, 26. The reason why the lower court refused to follow the traditional rules of real property law is made clear by the decisions it relied upon: the Tenth Circuit had previously concluded that Congress silently intended to "pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests" when it adopted the 1875 Act to create an "implied reversionary interest" in all railroad right-of-way grants. Pet. Cert. App. at 5; *Marshall v. Chicago & Nw. Transp. Co.*, 31 F.3d 1028, 1030-32 (10th Cir. 1994) (quoting *Idaho v. Oregon Short Line Railroad*, 617 F. Supp. 207, 212 (D. Idaho, 1985)). The decision below extended the Tenth Circuit's rule, holding that all private landowners whose titles are traceable to a federal land patent will be subject to the government's unexpressed reservation of a reversionary interest in a railroad right-of-way, regardless of the rights and expectations established by their titles. Pet. Cert. App. at 5-6.

As explained in the Brandts' brief on the merits, the Tenth Circuit's decision is based on a flawed construction of the 1875 Act. Amici write separately to emphasize how the Tenth Circuit's rule departs from ordinary understandings of property ownership, and will adversely affect landowners across the nation.

Typically, when Congress uses a term of art taken from the common law—as it did in the 1875 Act by granting a "right of way through the public lands of the United States" (1875 Act § 1)—it is presumed that Congress intended for the term to have its ordinary, common law meaning:

> Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Evans v. United States, 504 U.S. 255, 259-60 (1992) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."). Thus, while Congress has the authority to override a common law principle when enacting new laws, to do so, it must "speak directly" to the question addressed by the common law. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 79 n.2 (1996) (It would be error for a court to conclude that Congress intended to abolish well-settled common-law rights in property by mere implication). Congress did not do so when adopting the 1875 Act.

If not reversed, the Tenth Circuit's rule will unsettle the rights and expectations of tens of thousands of landowners across the nation. *See, e.g., Brown v. Washington*, 924 P.2d 908, 916 (1996) (relying on federal precedent to determine ownership of abandoned railroad easements). Between 1781 and

2010, the United States conveyed approximately 816 million acres of public lands into private ownership (individuals, railroads, etc.).[3] The federal government transferred another 328 million acres to the states generally, and an additional 142 million acres to Alaska.[4] Simply put, "[g]enerations of land patents have issued without any express reservation of the right now claimed by the Government." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979). Amici urge this Court to reverse the Tenth Circuit's opinion in this case and to reaffirm the fundamental common law principle that ownership of land will be determined by title, not implication.

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[3] U.S. Dept. of the Interior, Bureau of Land Management, Public Land Statistics, 2010, Table 1-2, http://www.blm.gov/public_land_statistics/pls10/pls10.pdf (last visited Nov. 4, 2013). Most transfers to private ownership (97 percent) occurred before 1940; homestead entries, for example, peaked in 1910 at 18.3 million acres but dropped below 200,000 acres annually after 1935, until being fully eliminated in 1986. U.S. Dept. of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970 (Washington, DC: GPO, 1976), H.Doc. 93-78 (93rd Congress, 1st Session), pp. 428-29. The homesteading laws were repealed in 1976, although homesteading was allowed to continue in Alaska for 10 years.

[4] *Id.*

ARGUMENT

I

THE COMMON LAW OF PROPERTY IS AN ESSENTIAL PREDICATE WHEN CONSTRUING FEDERAL RAILROAD RIGHT-OF-WAY GRANTS

A. Disputes over Ownership of Railroad Rights-of-Way Have Historically Been Determined by Reliance on Common Law Principles

The Tenth Circuit's repudiation of the common law is fundamentally at odds with decisions of this Court and other courts that relied on the common law to define property interests in railroad right-of-way cases. Indeed, the common law guided this Court in construing the 1875 Act in *Great Northern Railway Company v. United States*, 315 U.S. 262 (1942). In that case, the federal government sought an injunction to stop a railroad company from drilling for or removing gas, oil, and other materials from lands underlying an 1875 Act right-of-way. *Id.* at 270. The railroad argued that the 1875 Act conveyed a fee interest, giving it the right to extract oil from its land. *Id.* The government, relying on the common law definitions of easements and fee estates, argued that 1875 Act grants were "strictly limited" in scope and conveyed "a mere right of passage across the public domain." *See* Brief for the United States, *Great Northern Ry. Co. v. U.S.*, 1942 WL 54245 at 5 (U.S., 2006). Significantly, the United States contended that, because the railroad had taken only an easement, the fee itself—including all minerals and subsurface rights—remained federal property. *Id.* at 5, 11. The

government's argument focused on Section 4 of the 1875 Act, which provided that "all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way." *Id.* at 11. The United States argued, "[t]o construe the right of way grant as a fee in the land would be to rob this provision of all meaning. It surely would have been novel, as well as wholly unnecessary, for Congress, after it granted a fee, to declare that the adjacent lands are to be conveyed 'subject to' the prior grant in fee." *Id.* The *Great Northern* Court agreed that "[t]his reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee." *Great Northern*, 315 U.S. at 271. Thus, following traditional principles of property law, the Court concluded that the Act "grants only an easement, and not a fee." *Id.* (" '[a]pter words to indicate the intent to convey an easement would be difficult to find.' ") (quoting *MacDonald v. United States*, 119 F.2d 821, 825 (9th Cir. 1941)).

Notably, when arguing *Great Northern*, the United States anticipated that a similar dispute could arise between railroad companies and patentees of the fees underlying 1875 Act rights-of-way. The federal government argued that the same common law principles applied in *Great Northern* should be applied in future cases involving patentees, such as the Brandts:

> Many legal subdivisions crossed by railroad rights of way have since been patented to homesteaders, stock-raisers, and miners. This fact suggests an additional question whether these subsequent patentees have not thereby succeeded to the mineral rights

> of the Government in the lands thus patented But inasmuch as the United States still owns thousands of acres of unpatented land along the Great Northern and other railroad rights of way, it is in a position to litigate the scope of the 1875 Act without raising at this time the legal effect of particular patents in specific cases. **It may be said in passing that the solution to the question whether the Government's mineral rights in particular parcels have passed to individual patentees will depend on the language of the statute under which the patent was issued, on the classification of the land at the time the patent was issued, and on the nature of the interest which this Court ultimately decides was granted to the railroads under the 1875 Act.**

Brief for the United States, 1942 WL 54245 at 10 n.4 (emphasis added).

Contemporaneous administrative land decisions also viewed railroad rights-of-way as common law easements, and relied on traditional principles of property law to define the nature and scope of federal land grants when the property is traversed by a railroad right-of-way. For example, an 1888 decision instructed that patentees must pay for the full area purchased with no deduction for the right-of-way easement because the patentee was taking title to the entire tract, including the land underlying the easement:

> The act of March 3, 1875, is not in nature of a grant of lands; it does not convey an estate

> in fee . . . All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of subdivision entered, there being no authority to make deductions in such cases.

Great Northern, 315 U.S. at 275, n.13 (quoting 12 L.D. 423, 428 (Jan. 13, 1888)). Many other decisions from that period apply common law principles to resolve disputes concerning railroad rights-of-way. *See, e.g.*, *John W. Wehn*, 32 Pub. Land Dec. 33 (1903) (noting that the rights-of-way granted under 1875 and 1891 acts were mere easements and that the applicant to purchase land over which they passed would therefore be required to pay for the entire tract); *Brucker v. Buschmann*, 21 Pub. Land Dec. 114 (1896) (finding railroad right-of-way does not diminish the acreage held in fee by the homesteader); *Mary G. Arnett*, 20 Pub. Land Dec. 131, 132 (1895) (a grant under the1875 Act conveyed "an easement and not the land"); *Pensacola & Louisville R.R. Co.*, 19 Pub. Land Dec. 386 (1894) ("[L]ands across which a right-of-way is claimed by a railroad company [under federal land grants] may be disposed of by patent . . . patentees will take the servient tenement, subject to whatever servitude may exist, and they will find ample protection in the courts, should any attempt be made to deprive them of the use or occupancy of their land . . ."); *Fremonth, Elkhorn and Missouri Valley Ry. Co.*, 19 Pub. Land Dec. 588 (1894) ("That the right of way granted by the [1875] act in question is a mere easement can not be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of subject to the right of way'."); *Eugene*

McCarthy, 14 Pub. Land Dec. 105 (1892) (title to mineral claim would become unrestricted upon abandonment of federal land grant right-of-way); *Right of Way*, 12 Pub. Land Dec. 423, 428 (1891) (under the 1875 Act, settlers take the full tract of land that is subject to the right-of-way).

Indeed, the United States continued to rely on the common law when defending its rails-to-trails policy against a takings challenge in *Preseault v. Interstate Commerce Comm'n* (*Preseault I*), 494 U.S. 1 (1990). In that case, the property owners alleged that the rails-to-trails statute[5] was unconstitutional on its face because it effected a taking of landowners' ownership interests in abandoned railroad rights-of-way without payment of just compensation. *Id.* at 9. The federal government argued, in part, that its rails-to-trails policy should not be subject to facial invalidation because the nature of each landowner's property interests will change based on the terms of the deeds and the applicable common law rules:

> In this case, the nature of petitioners' property interest, if any, has not yet been determined. Petitioners and the State of Vermont dispute whether the interest acquired in 1899 by the State's predecessor in interest, the Rutland-Canadian Railway, was an easement or an estate in fee simple. **If the interest was acquired in fee simple, then petitioners have no right in the property whatsoever and,**

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[5] National Trails System Act Amendments of 1983 (Amendments), Pub. L. 98-11, 97 Stat. 48, to the National Trails System Act (Trails Act), Pub. L. 90-543, 82 Stat. 919 (codified, as amended, 16 U.S.C. § 1241 *et seq.*).

> **consequently, no basis for a takings claim. Moreover, even if the railroad acquired only an easement, the question whether petitioners have a colorable claim of a taking would depend upon the terms of that easement.** The document creating an easement may specify the events on which a reversionary interest will vest in possession, may speak in ambiguous terms, or may be completely silent on the issue. **And in all cases, state law will guide the inquiry into the intent of the parties and whether that intent will be respected.** Thus in some cases, interim trail use may cause an easement to revert; in other cases, it may not.

Brief for the United States, *Preseault v. Interstate Commerce Comm'n*, 1989 WL 1127500 at 23-24 (U.S., 1989) (citations omitted; emphasis added); *see also Preseault I*, 494 U.S. at 24 ("Even the federal respondents acknowledge that the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest.").

Again, the Court agreed with the United States' arguments, holding that it was necessary for a court to determine the parties' common law property interests before deciding who owns the land over which the right-of-way runs:

> [The rails-to-trails statute] gives rise to a takings question in the typical rails-to-trails case because **many railroads do not own**

> **their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations. State law generally governs the disposition of reversionary interests,** subject of course to the ICC's "exclusive and plenary" jurisdiction to regulate abandonments.

494 U.S. at 8 (emphasis added); *see also id.* at 24 ("Well-established principles will govern analysis of whether the burden the ICC's actions impose upon state-defined real property interests amounts to a compensable taking."). Following *Preseault I*, both the Federal and Seventh Circuits held that determining the character of the right-of-way is a necessary first step before deciding ownership of the land because not all railroad rights-of-way involve the same property interest. *See, e.g., Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); *Hash v. United States*, 403 F.3d 1308, 1314 (Fed. Cir. 2005); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004); *Presault II*, 100 F.3d at 1533; *see also Samuel C. Johnson 1988 Trust v. Bayfield County*, 649 F.3d 799, 803 (7th Cir. 2011) (concluding that the Federal Circuit's approach to rails-to-trails disputes as "make[s] better sense" than the Tenth Circuit's conclusion that the government holds an implied reversionary interest in all railroad rights-of-way).

The common law understandings of easements and freehold estates have always guided the courts and

federal government when defining the character of property interests conveyed in cases concerning railroad rights-of-way. There is simply no historical or legal basis for the Tenth Circuit's decision to depart from traditional principles of property law when construing the 1875 Act.

B. The Tenth Circuit Provides No Justifiable Explanation for its Repudiation of the Common Law

The Tenth Circuit's decision to repudiate the common law is not based on the language of the 1875 Act—there is nothing in the statute indicating an intent to alter or abrogate the common law of property. Instead, the decision is based on the Circuit's earlier decision, *Marshall*, 31 F.3d 1028. In that case, the Tenth Circuit rejected the reasoning of *Great Northern* in favor of an Idaho district court decision, concluding that the federal government held an "implied condition of reverter" in all 1875 Act rights-of-way. Pet. Cert. App. at 5 (citing *Marshall*, 31 F.3d at 1031-32 (quoting *Oregon Short Line*, 617 F. Supp. 207)).

Oregon Short Line involved a dispute over ownership of an abandoned right-of-way easement. 617 F. Supp. at 208-09. Key to the dispute was whether this Court was correct when it held, in *Great Northern*, 315 U.S. at 271, that the 1875 Act conveyed an easement, not a possessory interest in the land. *Oregon Short Line*, 617 F. Supp. at 211. The trial court began its analysis by asserting that, although this Court "denominat[ed] the railroad's interest as an 'easement,' " it did not expressly hold that it was incorporating all of the common law definitions and rules relating to easements. *Id.* Based on that, the

trial court determined that *Great Northern* was an incomplete decision, and substituted its own analysis of the Legislative history for this Court's interpretation of the 1875 Act.[6] *Id.* at 211-12; *but see Great Northern*, 315 U.S. at 277 ("That [the railroad company] has only an easement in its rights of way acquired under the Act of 1875 is therefore clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments."). Then, based entirely on its consideration of later-enacted statutes, the Idaho federal district court concluded that Congress "felt that it had some retained interest in railroad rights-of-way," and imputed an intent to create an "implied condition of reverter" on all railroad right-of-way grants. *Oregon Short Line*, 617 F. Supp. at 212.

The Idaho trial court had no idea, however, what type of property interest was granted to the railroad, retained by the government, or conveyed to the patentee—let alone, whether any of those interests was recognized by the common law. *Id.* Instead, the court simply concluded that Congress must have silently exercised its authority to "pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests" in order to create a reversionary interest in all railroad right-of-way grants. *Id.* at 212.

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[6] Although Amici do not address the competing legislative histories offered by the parties to this case, this Court should note that the history adopted by *Oregon Short Line* is contrary to the analysis argued by the United States in its 1942 Merits Brief filed with this Court in *Great Northern*. *See* Brief for the United States, *Great Northern Ry. Co. v. U.S.*, 1942 WL 54245 at 15-35.

Marshall adopted the "result and rationale" of *Oregon Short Line* in order to give effect to the federal government's current policy toward abandoned railroad rights-of-way. *Marshall*, 31 F.3d at 1032. And, like the Idaho trial court, the Tenth Circuit paid the common law no heed, stating that "[t]he precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law." *Id.* at 1032 (quoting *Oregon Short Line*, 617 F. Supp. at 212). As a result, in *Brandt*, the court awarded ownership of the land underlying the abandoned railway right-of-way to the federal government without ever identifying the property interests held by the railroad or patentee. Pet. Cert. App. at 5-6.

II

THE COMMON LAW OF PROPERTY DOES NOT RECOGNIZE AN "IMPLIED REVERSIONARY INTEREST" IN EASEMENTS

The question presented asks whether the United States retained an "implied reversionary interest" in a 1875 Act railroad right-of-way after the government patented and sold the underlying lands into private ownership. To consider that question, it is essential to understand precisely what the common law says in regard to railroad rights-of-way and reversionary interests. *Preseault I*, 494 U.S. at 8.

Not all railroad grants involve the same property interest. At certain times in history, the federal government granted the railroad companies

rights-of-way as limited fee estates.[7] *See, e.g., Great Northern*, 315 U.S. at 273-74; *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903); *see also* Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 Ecology L.Q. 673, 686-89 (2011). At other times, the government granted the railroad companies rights-of-way as easements. *Great Northern*, 315 U.S. at 271. The type of right-of-way owned by a railroad depends upon the specific terms and conditions of the original conveyance, which, in

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[7] Between 1850 and 1871, Congress subsidized railroad construction through individual, large grants of public land. *Great Northern*, 315 U.S. at 273. These grants eventually met with much public disapproval. *Id.* Responding to that criticism, in 1871, Congress changed its policy toward land grants for railroad companies. Still wishing to "encourage development of the Western vastnesses," yet unwilling to provide direct grants of land to railroad companies, Congress initiated a policy by which it passed special acts for designated railroad companies, granting only individual "rights-of way" over public land. *Id.* at 274. Granting railroads only a "right-of-way" for railroad purposes through and over federal lands, instead of granting whole land parcels, represented "a great shift in congressional policy." *See United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 119 (1957). This policy change was crystallized in a House Resolution passed in March, 1872, which stated: "Resolved, that in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." Cong. Globe, 42d Cong., 2d Sess., at 1585 (1872). Thus, after 1871, outright grants of public lands were discontinued, and Congress began a policy of making individual, specialized right-of-way grants to specific railroad companies. Eventually, however, enacting special legislation for individual railroad companies became burdensome, and led to the passage of the General Railroad Right of Way Act of 1875. *Great Northern*, 315 U.S. at 275.

turn, relies on common law understandings of easements and fee estates. *Id.*

The common law does not recognize a "reversionary interest" in an easement. A reversion is a future possessory interest created when the owner of a fee estate conveys a lesser estate to a transferee (*e.g.*, a life estate or a term of years). *Preseault II*, 100 F.3d at 1533. The grant of an easement, by contrast, transfers no ownership interest in the underlying land to the holder of the right-of-way. *Preseault II*, 100 F.3d at 1542; *see also Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994) ("[T]he owner of land, who grants a right of way over it, conveys nothing but the right of passage and reserves all incidents of ownership not granted."); *Board of County Sup'rs of Prince William County, Va. v. United States*, 48 F.3d 520, 527 (Fed. Cir. 1995) ("[A] fee simple estate is not an easement, or vice versa"). Instead, an easement creates a servitude on the land—an incorporeal hereditament—that grants the holder "a right to make use of the land over which the easement lies for the purposes for which it was granted." *Preseault II*, 100 F.3d at 1545 (citing 7 Thompson on Real Property § 60.02(c), (d)). Thus, the interest that the fee holder has in an easement is properly characterized as "a present estate in fee simple, subject to the burden of the easement." *Id.*

That description provides an important distinction. According to traditional property law, the termination of an easement "would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden." *Toews*, 376 F.3d at 1376. Because

the fee holder has a present ownership interest in the entire property, a transfer of the property in fee simple will convey the entire tract, including the land under the easement, to the new owner. *Railroad Co. v. Baldwin*, 103 U.S. 426, 430 (1880); *Energy Transp. System Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696, 698-99 (8th Cir. 1980); *see also Boesche v. Udall*, 373 U.S. 472, 477 (1963) (a land patent "divests the government of title"). Thus, if a fee holder wants to retain a possessory interest in the land underlying an easement, he or she must do so by express reservation when conveying the fee simple. *See Leo Sheep Co. v. United States*, 440 U.S. at 678-79; *Hash*, 403 F.3d at 1318 ("[P]roperty rights that are not explicitly reserved by the grantor cannot be inferred to have been retained.").

The preceding point is best illustrated by contrasting an easement with a limited fee estate. A grant of a limited fee estate (also known as a fee simple determinable, base fee, or qualified fee) conveys a fee simple subject to a special limitation, such as a requirement that the property be used only for railroad purposes. *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 485 (10th Cir. 1998) (citing Chester H. Smith & Ralph E. Boyer, *Survey of the Law of Property* 8 (2d ed. 1971)); *see also State of Wyoming*, 27 IBLA 137, 164 (1976) (Chief Administrative Judge Frishberg, dissenting) (citing L. M. Simes, *Law of Future Interests* 28-29 (2d ed. 1966)). Upon the occurrence of the special limitation, the fee estate will automatically terminate and the property will revert to the grantor or his successors in interest. *Mount Olivet Cemetery*, 164 F.3d at 485; *Wyoming*, 27 IBLA at 164 (citing Simes; 1 Tiffany, Herbert T., *Real Property* §

220 (3d ed. 1939)). But, until the condition for reverter is triggered, the owner of the limited fee is considered the "absolute owner of the land."[8] *Choctaw O. & G. R.R. Co. v. Mackey*, 256 U.S. 531, 538-39 (1921). Thus, if the federal government granted a railroad right-of-way as a limited fee, the government would hold no present property interest in the land so long as it continued to be used for railroad purposes. *Northern Pacific*, 190 U.S. at 270. If, in that circumstance, the government were to convey the surrounding land to a private party, the conveyance would not transfer title to the land underlying the right-of-way. *Id.* at 270. And the owner of the surrounding lands would not acquire the government's possibility of reverter in the railroad right-of-way, unless that future interest was expressly conveyed.

The Tenth Circuit's recognition of an "implied reversionary interest" in an easement does not comport with the traditional rules of property. Indeed, even commentators who support the modern rails-to-trails policy, acknowledge that *Oregon Short Line* created a property interest that was neither recognized nor bound by common law principles. *See, e.g.*, Darwin P. Roberts, *The Legal History of Federally Granted*

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[8] A possibility of reverter does not vest rights in the holder until the conditions necessary to trigger the reversionary interest transpire. *Commonwealth Transp. Comm'r v. Windsor Indus., Inc.*, 630 S.E.2d 514, 520, 523 (Va. 2006) (a possibility of reverter does not accrue as an enforceable right to reconveyance until the contingencies for the forfeiture of the fee occur; possibility of reverter is not a vested right); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1233 (D. Utah 2004) (possibility of reverter is a limited interest, immaterial with respect to the current right of possession; it does not establish ownership of the property; it is, at best, a future estate and not a present interest; and it is not considered property in the constitutional sense).

Railroad Rights-of-Way and the Myth of Congress's "1871 Shift", 82 U. Colo. L. Rev. 85, 101 (2011); Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. United States and the Threat to Rail-Trail Conversions*, 38 Envtl. L. 711, 731-32 (2008); Gregg H. Hirakawa, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 Seattle U. L. Rev. 481, 504 (2001). The only reason for the Tenth Circuit's rule is to alter property law in a manner that gives effect to the government's later-adopted policies:

> [T]he policy interests of the United States sometimes shift. Whereas the 1875 Act legislative history suggests that the railroads should be given only a right-of-way through the public lands so the public land can be reserved for homesteading by settlers and for educational purposes, the government currently urges use of the same land for the Rails to Trails program. Moreover, the United States Supreme Court in Great Northern used the presumption in favor of the government to establish the railroad right-of-way as an easement, whereas the government now is attempting to use the presumption in its favor to define the right-of-way as in the nature of a fee, with a reversionary right. The 1875 Act, however, is not ambiguous, rather, the 1875 Act is silent regarding a reversionary right in the government's favor and uses the clear phrase "right of way through the public lands of the United States . . ."

Beres v. United States, 64 Fed. Cl. 403, 423 (2005) (citing the Act of 1875, § 1, and criticizing *Marshall* and *Oregon Short Line*). Such a drastic change in the law of property, however, should only be made if it is the express and clear intent of Congress, not out of expedience.

III

THE TENTH CIRCUIT'S RULE THREATENS THE CERTAINTY AND STABILITY OF TITLE

The consequences of the Tenth Circuit's decision are far-reaching. The common law relies on a predicable and well-understood system for characterizing the various types of interests in property. *See, e.g., Preseault II*, 100 F.3d at 1542-46; *Carney*, 757 P.2d at 562-63. The terms used by the common law have precise definitions, and a complex system of rules flows from those definitions. *Id.*

Landowners rely on those definitions and terms to establish ownership of property. But if courts are unwilling to give effect to titles, the owners' interests and expectations in their property become potentially worthless. *See Hardin v. Jordan*, 140 U.S. 371, 381 (1891) (An attempt to impute an unexpressed reversionary interest into a government land grant "is calculated to render titles uncertain, and to derogate from the value of [the property].").

This Court has "traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill defined power to construct public thoroughfares without compensation." *Leo Sheep*, 440 U.S. at 687 (citing *Iron*

Silver Min. Co. v. Elgin Min. & Smelting Co., 118 U.S. 196, 206-07 (1886); *Lessee of Irwin H. Doolittle's Lessee v. Bryan*, 55 U.S. 563, 567 (1852)); *see also Beres*, 64 Fed. Cl. at 427 ("A fundamental precept of our property ownership system and system of laws includes certainty of ownership upon purchase, whether by receipt of a land patent from the federal government or a deed from a private party."). Accordingly, this Court condemned the very idea that the government can hold an implied property interest that is inconsistent with the terms of a property grant. *Leo Sheep*, 440 U.S. at 687; *Hardin*, 140 U.S. at 381.

This case provides a good example of the rights threatened by the Tenth Circuit's rule. The Brandts' parents acquired title in fee simple to property traversed by a railroad easement. Pet. at 10-11. It is well-recognized that a federal land patent passes "a perfect and consummate title" to the owner.[9] *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839); *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 331 (1924) ("[W]hen a patent issues in accordance with governing statutes, all title and control of the land passes from the United States."). A federal land patent "is intended to quiet title to and secure the enjoyment of the land for the patentees and their successors." *Grainger v. United States*, 197 Ct. Cl. 1018, 1024 (1972) (citing *Dominguez De Guyer v. Banning*, 167

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[9] "A patent to land, issued by the United States under authority of law, is the highest evidence of title, something upon which its holder can rely for peace and security in his possession. It is conclusive evidence of title against the United States and all the world, until cancelled or modified by an action brought for this purpose." *Nichols v. Rysavy*, 610 F. Supp. 1245, 1254 (D.S.D. 1985) (quoting 2 *The American Law of Mining*, § 1.29, at 357), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987).

U.S. 723, 743-44 (1897)). Once a parcel is patented and sold as private property, the federal government "is absolutely without authority" to alter the property interests transferred. *Moore v. Robbins*, 96 U.S. 530, 533 (1877); *see also United States v. Eaton Shale Co.*, 433 F. Supp. 1256, 1267 (D. Colo. 1977) ("The [government] loses its jurisdiction over the land as soon as a valid patent is issued." (quoting 2 *Patton on Land Title*, § 292, at 26-27)). Under the rule repudiated by the Tenth Circuit, resolution of any dispute over ownership of the land would be resolved by the plain terms of the conveyances: a patent of land underlying a railroad right-of-way "conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues . . . such patentee takes the fee subject only to the railroad company's right of use and possession." *Hash*, 403 F.3d at 1314 (quoting 43 C.F.R. § 243.2 (1909) (repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, *et seq.*)).

The Tenth Circuit's rule, however, states that the United States will always hold a superior "reversionary interest" in the land under an abandoned railway easement, regardless of the plain meaning of the words of the 1875 Act and the plain meaning of the words in a land patent. Under that rule, "titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, [are] subject to the fluctuating, and in many cases unreliable, action of the [government]." *Moore*, 96 U.S. at 533.

The Tenth Circuit's rule will impact more than the current owners of patented lands. The federal government conveyed millions of acres of land into

private ownership with patents that did not reserve any reversionary rights to the United States. No prospective purchaser of the patented lands could have found a right-of-way reservation from examining either the underlying legislation, the patents, or the public land records over the years following the issuance of the patents. *Beres*, 64 Fed. Cl. at 427 ("The average citizen, the reasonable man, expects that a contract to transfer land, whether from a public or private owner, is effective and will not be retroactively changed many years after the land transfer."). The decision below, by repudiating the common law rules of property in favor of a rule that grants the federal government an unexpressed reservation in federal land patents, would not only impair the rights of the patentees but would also impact bona fide purchasers succeeding to their titles, long after the time when their rights should have been deemed vested by title.

CONCLUSION

The Tenth Circuit's decision undermines this Court's policy of promoting certainty and predictability in land titles by abolishing the rights and expectations established by traditional rules of real property law. The decision below vests essential property rights in the federal government, despite alienation, allowing the government to wait for years—even a century or more—before exercising its rights against the current owners. There is no justification for a rule that gives the government an unexpressed property interest in lands that it had long-ago conveyed into private ownership. This Court should reverse the Tenth Circuit's opinion in this case and reaffirm the fundamental common law principle that ownership of land will be determined by title.

DATED: November, 2013.

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AMICUS CURIAE BRIEF

No. 12-1173

IN THE

Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* RAILS TO TRAILS CONSERVANCY, AMERICAN TRAILS, AMERICAN HIKING SOCIETY, AMERICAN RECREATION COALITION AND NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The Rails-to-Trails Conservancy (RTC) is a nonprofit corporation whose mission is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. RTC provides technical and other assistance to state and local governments and other organizations in preserving otherwise-to-be-abandoned railroad corridors for continued public use. RTC has more than 100,000 members and supporters nationwide. As an organization that promotes the preservation of rail corridors, RTC is acutely interested in the federal statutes that govern federally granted–railroad rights-of-way (FGROW). RTC and its members support the preservation of these transportation corridors for continued public transportation uses, including the Medicine Bow Trail at issue in this case, a magnificent rail-trail through southeastern Wyoming's Medicine Bow National Forest.[2] RTC has participated as *amicus* in several cases related to these transportation corridors, including in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), which is in conflict with the decision under review. RTC also submitted an *amicus* brief in the Tenth Circuit in the instant case.

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1. No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund such preparation or submission. The Petitioners have filed blanket consents with the Court consenting to the filing of all *amicus* briefs. The consent of the Respondent is attached thereto.

2. For photographs of this stunning rail-trail, *see* http://www.railstotrails.org/resources/documents/magazine/2009_Spring-Summer_Cover%20Feature.pdf.

American Hiking Society (AHS) is a national, nonprofit organization formed in 1976 serving the more than 43 million Americans who hike through its mission of promoting hiking trails, their surrounding natural areas and the hiking experience. AHS promotes the protection and management of rail corridors for recreation and public transportation, including through the federal statutes that govern FGROW.

The National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a nonprofit organization for the purpose of furthering the historic preservation policies of the United States and to "facilitate public participation" in the preservation of our nation's heritage. 16 U.S.C. §§ 468–468d. With some 750,000 members and supporters nationwide, the National Trust carries out a wide range of programs and activities to advance the public interest in the preservation of America's heritage, including the protection of historic resources on public lands.

The American Recreation Coalition (ARC) is a nonprofit organization formed in 1979 to catalyze public/private partnerships to enhance and protect outdoor recreational opportunities and the resources upon which such experiences are based. ARC has a strong interest in the protection, enhancement, and expansion of trails—including rail-trails and the federal statutes that govern FGROW.

The unique nature of FGROW has caused courts (including this Court) to attach differing common law property labels to this federally granted right. In this case, those labels are of secondary importance and have

led some lower courts (including the United States Court of Appeals for the Federal Circuit) to reach a result that cannot be squared with the plain language and legislative history of the laws creating and governing FGROW. This Court's recognition of the United States' retained property interest in the FGROW would resolve one of the major issues confronting RTC and the other *amici* seeking to protect the public's interest in these irreplaceable transportation corridors.

Of comparable importance, a finding in favor of the United States would be a step toward redressing the Federal Circuit's decision in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005). That case has damaged efforts nationwide to preserve our Nation's built rail infrastructure for continued and future public transportation use by holding that the United States did not retain any interest in FGROW where the adjacent lands had been conveyed to private parties in patents that did not describe and reserve the United States' interest in the land embraced by the FGROW.

A definitive recognition of the United States' continued interest in federally granted transportation corridors by this Court will help steer the lower courts away from this destructive path.

SUMMARY OF ARGUMENT

Petitioners and their *amici*, like the plaintiffs in *Hash*, rely on state common law property concepts, arguing that FGROW are "easements" whose attributes are comparable to easements defined by state law. Their argument ignores the plain meaning of the General Railroad Right-of-

Way Act of 1875, 43 U.S.C. §§ 934–939 (1875 Act), which authorized the acquisition of the right-of-way through federal lands, the legislative history of the 1875 Act, and Congress's later statutes, which further defined how these federal property interests could be forfeited, abandoned, or conveyed. If, as Petitioners argue, the land underlying the FGROW passed to the patent holders, then the purpose of these later statutes would be frustrated once the adjoining land passed from federal hands to private ones—the transportation corridors would disappear as soon as the railroad itself ceased its operations. Congress has repeatedly and explicitly repudiated any intent to relinquish the United States' interest in these rights-of-way even after abandonment by railroads.

In *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), a case on which Petitioners rely, this Court held simply that 1875 Act FGROW did not convey to the railroad the United States' mineral rights, and explained that exclusion by using the easement concept. That court did not define the actual contours of this unique federal property interest with respect to the continuing role of the United States; nor did it overrule the Supreme Court's prior ruling that the 1875 grant was "a limited fee made on the implied condition of reverter to the United States." *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903). In fact, the *Great Northern* case and *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 119-20 (1957) (the only other Supreme Court case to address the nature of 1875 Act FGROW) do not deal with the rights of private landowners at all.

Federal law alone should govern the interpretation of the FGROW when interpreting the specific 1875 Act

grant at issue here. Like prior federal statutes granting FGROW, the 1875 Act authorized railroad rights-of-way through *public* lands—to apply state law would be illogical. The implied reservation of rights in the right-of-way to the United States in patents of adjacent lands effectuates the clear intent of Congress to regulate, maintain, and control the disposition of these corridors once the original railroad (or its assignees) abandoned their operations. To that end, Congress has regulated these FGROW for more than a century by, *inter alia*, managing the process by which railroad operations cease operation and permitting the construction of public highways and transfers to municipalities.

Since 1875, Congress has maintained its right to "alter, amend, or repeal" the statutory scheme governing FGROW. 43 U.S.C. § 939. This Court has recognized that such language permits Congress to modify rights enumerated in a statute, and in subsequent legislation Congress did just that as it managed future uses of the FGROW. *Sinking-Fund Cases*, 99 U.S. 700, 719-20 (1878). The ongoing statutory scheme maintained and periodically revisited by Congress illustrates more than concern for the fate of transportation corridors; it also demonstrates Congress's continued intent to control FGROW to ensure their future vitality. Thus, contrary to Petitioners' contention that abandonment pursuant to Section 912 is irrelevant to the resolution of this matter, Section 912 and the FGROW statutory scheme as a whole are important expressions of the intent of the original grantor—Congress—as to the scope and nature of this federally created right-of-way.

Petitioners' view—that an FGROW under the 1875 Act vanishes upon physical abandonment by a railroad —not only divorces the law from its history but also demands that this Court turn a blind eye to this subsequent federal legislation. Most fundamentally, in 1922, Congress dictated a process by which a railroad "abandons" the FGROW—the mere desire of the railroad to cease operations and remove the tracks is not sufficient. Railroads cannot freely alienate these corridors and otherwise dispose of the FGROW except in narrowly defined ways described by Congress. Congress's continued regulation and preservation of the FGROW is consistent with the Tenth Circuit's holding that the United States retains an interest in this 1875 Act FGROW.

Prior cases of this Court that have touched upon the nature of FGROW, including *Great Northern*, never addressed the interest of private landowners in FGROW. Regardless of whether a court has labeled an 1875 Act FGROW an "easement" or "limited fee" in past opinions, it is clear that Congress has always viewed these transportation corridors as federally controlled and subject to use for public purposes after abandonment by a railroad.

Finally, this Court should reject the invitation of Petitioners and their *amici* to adopt the rationale of the United States Court of Appeals for the Federal Circuit in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005). The *Hash* decision arises in a wholly different context—a "takings" challenge to a different federal law—Section 8(d) of the National Trails Systems Act, 16 U.S.C. § 1247(d). In removing the FGROW from federal control, *Hash* applied an already problematic analysis of "takings"

claims that this Court has previously noted would apply only to rail corridors involving property rights created and defined by "state law." *See Preseault v. ICC*, 494 U.S. 1, 20 (1990). Indeed, *Hash* applies the Federal Circuit jurisprudence in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996)—a ruling that is inconsistent with this Court's decisions applying the "takings" clause. That decision also warrants review by this Court, but here this Court should affirm the Tenth Circuit's decision to reject an interpretation of federal law that would frustrate Congressional statutes enacted to preserve these transportation corridors.

ARGUMENT

I. THE TENTH CIRCUIT DECISION BELOW SHOULD BE AFFIRMED BECAUSE CONGRESS INTENDED THAT THE UNITED STATES RETAIN AN INTEREST IN 1875 ACT FGROW IN ORDER TO MAINTAIN TRANSPORTATION CORRIDORS FOR PUBLIC USES.

A. Federal law—not state law—governs FGROW as they were carved out of public lands by the United States.

This Court has articulated the logical approach for examining FGROW. When presented with a question of abandonment pursuant to the 1922 Act, this Court stated that "Congress has power to authorize abandonment, because the state's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce." *Colorado v. United States*, 271 U.S. 153, 163 (1926). The *Colorado*

decision was rooted in Congress's need for "paramount control" in furtherance of interstate commerce, of which the railroads are an instrument. *Id.* at 165-66. *See also S. Ry. Co. v. North Carolina*, 376 U.S. 93, 104-06 (1964) (reiterating Congress's authority to structure a scheme for the regulation of interstate rail service).

Similarly, the Tenth Circuit has stated that "[i]t is enough to say that state law cannot operate to "impair the efficacy" of a federal grant or vest title in someone other than the federal grantee." *Boise Cascade Corp. v. Union Pac. R.R. Co.*, 630 F.2d 720, 724 (10th Cir. 1980). Because federally granted transportation corridors were the creation of Congress and have been continually revisited by Congress in an effort to ensure their continued viability for future generations, federal law operates to the exclusion of any conflicting state property law.

B. The United States retains the right to manage the FGROW that it used to develop transportation corridors throughout the nation.

When Congress created rights-of-way and left them in the possession of private railroad companies, it expected to maintain an interest in these transportation corridors. This expectation was rooted in Congress's role in promoting commerce and the development of the nation through, *inter alia*, the disposition of federal land in the sprawling but under-developed West. From its governance of canals in the early days of the nation, to the railroad age in the latter half of the nineteenth century, to the interstate highway system in the latter half of the twentieth century, Congress has used its legislative

powers to create and maintain this nationwide network of transportation corridors for the benefit of commerce in an expanding nation. *See generally* Paul W. Gates, *History of Public Land Law Development* (1968) (*Public Land*). The 1875 Act was one of several laws that governed federally granted rights-of-way to railroad companies, which sped the further development of western territories after the construction of the transcontinental railroads and the passage of the Homestead Act in 1862. *See* Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History:* Hash v. United States *and the Threat to Rail-Trail Conversions*, 38 Envtl L. 711, 717-24 (2008). These FGROW balanced the interests of the United States with those of the railroads, carved out a new property interest in public lands, and encouraged the development of railroad infrastructure by private enterprise.

Understanding the uniquely federal nature of the FGROW in the 1875 Act requires an understanding of the 1875 Act's predecessor statutes. In 1834, Congress began issuing individual railroads rights-of-way through public lands along the eastern seaboard and into the southern territories. These grants were broadly defined grants along a defined route 60-100 feet wide for road construction and the right to take timber, gravel, and water along the right of way. Resolution of June 25, 1834, ch. 3, 4 Stat. 744. With demand for public transportation increasing, Congress enacted the general right-of-way act of 1852 (1852 Act), which gave any charter railroad a 100-foot right-of-way across public lands plus the right to use earth, stone, and timber on adjacent public land for railroad construction, and to take additional land for depots and water tanks. Act of Aug. 4, 1852, ch. 80, 10 Stat. 28.

Congress's next round of legislation addressed the public need not only for transportation corridors, but also for roads and infrastructure. The federal government granted land to the newly-formed states adjoining the railroad's right-of-way with the expectation that they would in turn grant the land to the railroad, which would use the excess land to fund the construction. *See Public Land*, at 384-85. This multi-step, *ad hoc* partnership with the states evolved into legislation whereby Congress directly granted land in fee simple absolute in addition to its right-of-way grant. *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426 (1880) (determining that a grant by Kansas to a railroad in 1866 created a fee simple absolute). This direct form of aid to the railroads was born out of the United States' desire to complete transcontinental railroads at a time when private railroads lacked the economic and legal resources to mount a project of that scale. The first "grant in aid" was to the Union Pacific in 1862, followed by the Northern Pacific in 1864, the Southern Pacific in 1866, and the Texas Pacific in 1871.[3] Each "grant in aid" included generous donations of land for the railroad to sell to raise construction funds along with the right to place telegraph lines, and generous rights to gather timber, gravel, and water along the road. While these generous grants in aid spurred the completion of the railroad projects, they became unpopular with the public because various constituencies disliked the subsidies that had been pegged to the otherwise public works projects. *Public Land*, at 380-81. In response to public outrage at

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3. *See* Act of July 1, 1862, ch. 120, 12 Stat. 489, 493-94, *amended by* Act of July 2, 1864, ch. 216, 13 Stat. 356; Act of July 2, 1864, ch. 217, 13 Stat. 365, *amended by* Act of May 31, 1870, 16 Stat. 378, 378-79 (1870); Act of July 27, 1866, ch. 278, 14 Stat. 292; Act of Mar. 3, 1871, ch. 122, 16 Stat. 573, 578.

the largesse bestowed on the railroads, Congress ceased issuing "grants in aid" in 1871. *Public Land*, at 376-77.

While the "grants in aid" were themselves unpopular, the desire for additional railroad lines had not diminished. Congress responded with the statute directly at issue in this case: the General Railroad Right-of-Way Act of 1875 (1875 Act), which granted to all railroads a 200-foot right-of-way across public lands, but eliminated the concomitant land grant common in the grants in aid of the 1850s and 1860s. General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482 (*codified as amended at* 43 U.S.C. §§ 934–939). The language of the 1875 Act also refrained from mandating a specific, limited purpose for the given right-of-way. The broad right-of-way grant in the 1875 Act differed from the language in the Act of July 1, 1862, 12 Stat. 489, which provided in Section 2: "That the right of way through the public lands be, and the same is here granted to said company [the Union Pacific Railroad] *for the construction of said railroad and telegraph line.*"[4]

Some litigants and courts, including the Petitioners here and the Court in *Great Northern*, have described the 1875 Act as a "shift in policy" between 1871 and 1875, signaling the turn from a grant in fee to a grant in easement. Scholars have challenged that concept as "myth." *See* Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 Univ. Colo. L. Rev. 85 (2011).

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4. In *United States v. Union Pacific Railroad Co.*, 353 U.S. 113, 114 (1957), this Court noted this limitation, stating "this right of way was granted Union Pacific 'for the construction of said railroad and telegraph line.' § 2. That purpose is not fulfilled when the right of way is used for other purposes."

Darwin Roberts highlights the fact that while land grants did cease after 1871, these earlier grants in land were coupled with grants of rights-of-way. Congress's "shift" in policy in 1871 was the elimination of the land grant; what remained constant in grants both before and after 1871 was the creation of transportation corridors—designated as a "right of way" in each grant—which was placed in the present possession of the railroad to satisfy public transportation needs.

The mythical "shift" does not warrant a conclusion that the United States no longer retained a substantial interest in each right-of-way following its abandonment by the railroad. This retained federal interest is confirmed by contrasting the FGROW carved out of public lands with those carved out of Indian lands. Congress explicitly issued "easements" for railroads that passed over Indian land, and it included language that recognized the limits of its powers and future interests. Act of Feb. 28, 1902, ch. 134, 32 Stat. 43, 44. In contrast, no easement-like language exists in the 1875 Act right-of-way.

The legislative history of the 1875 Act supports the view that Congress, in passing the Act (and earlier statutes), retained for the United States an interest in the FGROW. Members of Congress recognized both the scope of the grants and the fact that ownership of adjoining land would change as settlement of Western territories continued, especially in light of the Homestead Act of 1862. The House Report of January 12, 1875 recognized Congress's continued interest in the railroad's right-of-way, even when the land adjoining that FGROW passed to private ownership, noting that when a potential conflict arose between the United States and all other interested

parties, the "people of the State" would not have the right to alter or impinge upon the railroad's interest in or exercise of its FGROW—only the United States retained that right. *See* 3 Cong. Rec. 406 (1875) (Statement by Congressman Hoar on the legal status of FGROW).

This legislative history reveals that in the 1875 Act Congress set aside public land with the understanding that it retained a future interest in these transportation corridors. This federal interest would trump conflicting interests of the railroad companies or of the various state interests that would inevitably arise in the future —an observation reflected in Congressman Hoar's statement. The future of these transportation corridors would be determined by Congress and not by the states.

Congress saw a continuing role for itself in the management of rights-of-way. These FGROW pursuant to the 1875 Act reflect Congress's view that its largesse—its use of sovereign power to foster transportation arteries vital to the expansion of the young nation—was not merely a handout to railroads. FGROW were placed in railroad companies' possession for transportation use. There the FGROW would remain until such time as the railroad no longer operated along the corridor, at which point the FGROW would be subject to disposition under federal law.

C. Legislation passed by Congress subsequent to the 1875 Act demonstrates Congress's ongoing exercise of authority over federally granted transportation corridors.

When rail lines became less economically viable in the early twentieth century, Congress confronted the

question as to how it would manage the United States' continued property interest. In response to the desire of railroads to abandon FGROW, either before or after construction, Congress enacted a number of statutes to regulate this process while preserving to the greatest extent possible the continued vitality of FGROW. Congress passed numerous acts to manage these railroad right-of-way grants, including those passed in 1898, 1906, 1909, 1920, 1921, and 1922.[5] Through such legislation, Congress established rules controlling the forfeiture and abandonment of the FGROW. Each act demonstrated Congress's understanding that it alone had authority to regulate, preserve, or destroy transportation corridors.

1. Congress Has Designed a Unique Abandonment Process for the FGROW.

After the expansion of the national railroad network and nationalization during World War I, many companies sought to abandon their rights in unprofitable lines. Abandonment of FGROW, however, did not operate under the common law concept—instead Congress developed an executive process to preserve the FGROW for public use. The scheme leaves no room for Petitioners' (and the *Hash* court's) view on abandonment, which simply ignores Congress's right to modify the nature of its FGROW. In this historical context, Congress considered various

5. Alaska Homestead Act of May 14, 1898, cc.299, 30 Stat. 409 (codified at 43 U.S.C. § 942-1 to 942-9); Railroad Forfeiture Act of June 26, 1906, c.3350, 34 Stat. 482 and Act of Feb. 25, 1909, c.191, 35 Stat. 647 (codified as amended at 43 U.S.C. § 940); Act of May 25, 1920, c.197, 41 Stat. 621 (codified at 43 U.S.C. § 913); Federal Highway Act of Nov. 21, 1921, c.119, 42 Stat. 212, 216 (codified as amended at 23 U.S.C. § 316).

options to deal with the decline of railroad operations. Two acts in particular illustrate the legislative scheme Congress developed.

In 1920, Congress passed 43 U.S.C. § 913, authorizing a railroad to "convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street." The statute structured the conveyance of a right-of-way from the possession of the private railroad to a public entity other than the federal government for use as a different kind of transportation corridor. The House Report for 43 U.S.C. § 913 confirmed the urgent need to preserve these corridors, stating: "this bill is greatly needed in the interest of the public highway development of the country. And the railroads are in many instances perfectly willing and anxious to be given this authority, and the States and counties and highway improvement associations are exceedingly anxious to have this legislation at the earliest moment." H.R. Rep. No. 66-843, at 4 (1920). The restrictions on conveyance in 43 U.S.C. § 913 reveal the intention of Congress to maintain authority over transportation corridors—even when overseeing the use of railroad corridors for other, new public purposes.

In formulating a process for legal "abandonment" of rights-of-way by railroads, Congress created a mechanism for retaining the public interest in the transportation corridor for as long as possible before finally transferring (as opposed to "returning") the right-of-way to a private party. Congress's concept of FGROW abandonment became a two-part process. First, Congress has significantly limited the rights of all railroads operating in interstate commerce to permanently

abandon rail operations. In a 1920 statute, Congress designated the Interstate Commerce Commission (ICC) to manage the abandonment process for all freight rail lines operating in interstate commerce. The ICC, and its successor, the Surface Transportation Board (STB), must determine whether public convenience and necessity permit discontinuation of rail service, which requires consideration of "serious adverse impact[s] on rural and community development." ICC Termination Act of 1995, 49 U.S.C. § 10903(d).

The federal interest in the preservation of FGROW continued with the passage of the Abandonment of Rails Act in 1922. 43 U.S.C. § 912. The 1922 Act added another layer to the abandonment process. Even after receipt of a declaration of abandonment from the ICC/STB, an FGROW was not considered "abandoned" until that abandonment had been "declared or decreed by a court of competent jurisdiction or by Act of Congress." *Id.* Congress further exercised control over the disposition of FGROW by allowing transfer to a municipality or the establishment of a public highway on the subject FGROW within a year of abandonment. Only then would "all right, title, interest, and estate *of the United States* . . . be transferred to and vested in any person . . . in title and interest to whom or to which title of the United States may have been or may be granted." 43 U.S.C. § 912. The plain language of Section 912—in discussing the "estate of the United States"—makes clear that the United States had retained a property interest in the grants made under the 1875 Act.

This two-part process created by Congress illuminates a statutory scheme for regulating the abandonment of

rights-of-way that preserves the interest of the United States for an extended period of time and preempts contrary common law definitions of abandonment. Indeed, lower courts have consistently determined that both steps in the process are necessary to effect abandonment. *See, e.g., Phillips v. Denver & Rio Grande W. R.R. Co.*, 97 F.3d 1375, 1377 (10th Cir. 1996) (no abandonment of 1875 Act right-of-way where railroad has not yet received authorization from ICC); *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1339 (9th Cir. 1990) (ICC/STB abandonment authorizations are not determinations of abandonment under 43 U.S.C. § 912). If the United States had relinquished all interest in 1875 Act FGROW such that Section 912 was inapplicable to such rights-of-way, a position asserted by Petitioners, both the process itself and the legislative scheme would be limited to only those rights-of-way granted before passage of the 1875 Act. In fact, many courts have found that Section 912 indeed applies to 1875 Act FGROW.[6] More significantly, this limitation would ignore Congress's clear and continuous assertion of its unique interest in transportation corridors irrespective of the land grants given or withheld along with them.

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6. *See, e.g., Marshall v. Chicago & Nw. Transp. Co.*, 826 F. Supp. 1310 (D. Wyo. 1992), *aff'd*, 31 F.3d 1028, 1030 (10th Cir. 1994); *State of Idaho v. Oregon Shortline R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999 (S.D. Ind. 2005) (applies to pre-1875 Act); *King Cnty. v. Burlington N. R.R. Corp.*, 885 F. Supp. 1419 (W.D. Wash. 1994) (applies to pre-1871 FGROW); *Keife v. Logan*, 75 P.3d 357 (Nev. 2003) (applies to pre-1875 Act).

2. The Legislative History of the 1922 Abandonment Statute Confirms the United States' Retained Interest in FGROW.

As with the 1875 Act itself, the legislative history of the 1922 Act supports a finding that the United States retained a property interest in the FGROW. In passing the 1922 Act, Congress was responding to this Court's decisions in *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267 (1903), and *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44 (1915), where the Court had assessed the nature of the FGROW when faced with claims from land owners adjacent to the FGROW. As discussed *infra*, this Court recognized an implied right of reverter to the United States in *Townsend* and a defeasible fee interest in *Stringham*. In a report, the House Committee on the Public Lands for the 67th Congress recognized explicitly that the Court had held that the railroads receiving 1875 grants had taken a "qualified fee with an implied right of reverter." H.R. Rep. No. 67-217, at 1-2 (1921). The report further recognized that the "abandoned and forfeited strips are of little or no value to the Government" once back in its possession after reversion but maintained that in the aggregate it "might be desirable to establish highways on such as may be abandoned in the future." *Id.*

When statutory language is ambiguous, courts may draw on legislative history, legislative purpose, or subsequent legislation to make sense of a given statute. *See United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79 (1875). Petitioners are incorrect in their assertion that Section 912 has no role in this dispute. As stated in *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980), "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such

views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." *See also Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911) ("subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.") Here, the legislative history of Section 912, when read alongside the statute and the 1875 Act, confirms that the United States intended to retain a property interest in the continued use and disposition of FGROW upon abandonment.

3. The 1988 Amendment to the National Trails System Act is the latest expression of Congressional intent to preserve the United States' interest in FGROW for future transportation needs.

In 1988, Congress modified the laws concerning the effect of abandonment of an FGROW by a railroad to further protect for public use the federal government's interest in these federally created transportation corridors. The 1988 amendments to the National Trails System Act (NTSA) provided that, as of 1988, the United States' interest in abandoned FGROW would "remain in the United States": "any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of Title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section." 16 U.S.C. § 1248(c). This recent legislation reinforces the federal interest in the FGROW.

D. Given the unique nature of FGROW, it is clear that the United States did not cede any rights in the corridor to Petitioners.

Congress's active role in creating and regulating rights-of-way through federal lands makes clear that Petitioners' land patent did not include the FGROW. The patent of land to Petitioners' predecessors noted that the grant was "subject to those rights for railroad purposes"—in essence describing the FGROW.

Petitioners (and the supporting *amici*) adopt a narrow and inappropriate construction of this language. The reservation of a "railroad right-of-way" is common in land patents to individual landowners—it is not an after-the-fact limitation of a general right of way grant that on its face contains no such limit. What Petitioners disregard in their analysis is that only Congress has the right to shape the scope of the FGROW in terms of what activity can occur within the right-of-way. Congress noted in passing the 1875 Act that it wanted to foster the development of transportation corridors. Congress did *not* adopt Petitioners' myopic view that only railroads and the adjacent landowners would benefit from this program, and indeed, it emphatically rejected such a view in 1988 when it enacted 16 U.S.C. § 1248(c).

The congressional intent underlying these statutes is the recognition that the FGROW is not merely a grant of surface rights to private railroads but instead a guarantee of corridors for public commerce and travel. Whether understood as an easement or fee, the reservation for "railroad purposes" incorporates all of the uses designated by Congress for FGROW, including

railroads, public highways, and those public highways used for non-motorized transportation (as they commonly were in 1920). Petitioners' argument that the government failed to properly reserve its interest is thus inapposite and demonstrates Petitioners' refusal to acknowledge Congress's continued rights in the FGROW. Put simply, Congress *did* reserve its ongoing interest in the federally granted right-of-way that has now become part of the Medicine Bow Trail.

II. PRIOR SUPREME COURT AND LOWER COURT PRECEDENT SUPPORT THE TENTH CIRCUIT'S HOLDING THAT THE UNITED STATES RETAINED AN INTEREST IN THE USE AND DISPOSITION OF 1875 ACT FGROW.

A. The Supreme Court cases addressing FGROW support the conclusion that the United States has a retained interest in federally granted transportation corridors.

In early Supreme Court cases, including *Townsend* and *Stringham*, the Court recognized the unique nature of the FGROW when presented with challenges from encroaching settlers or from enterprising railroads looking to maximize the value of the grant. In each opinion, the Court used state common law property labels to explain its decision. The resort to such labels for describing the unique federal interest created by the 1875 Act in *Great Northern* resulted from that Court's use of the term "easement" in order to underscore its holding that the railroads did not acquire any mineral rights in FGROW. The change from the "limited fee with the right of reverter" language over a short period of time reflects

only the issue before the Court—that the railroad had only limited rights in the FGROW.

Here this Court considers for the first time the nature of FGROW as an element of the statutory scheme created by Congress to regulate and preserve transportation corridors. None of the previous FGROW decisions by this Court discuss the abandonment statute, 43 U.S.C. § 912, or the 1988 Amendments to the National Trails System Act (NTSA), 16 U.S.C. §1248(c). In fact, the Federal Circuit in *Hash* ignored the NTSA altogether and simply declared Section 912 to be inapplicable because the United States did not explicitly retain "a fee interest . . . when granting the land patents here involved." *Hash v. United States*, 403 F.3d at 1318.

Although Petitioners pay significant attention to the decision in *Great Northern*, this Court's previous assessment of FGROW in *Townsend* has been the only occasion where the Court has had the opportunity to assess the nature of the 1875 Act FGROW itself, as opposed to its scope with regard to mineral rights. Prior to *Townsend*, this Court held that railroads hold fee simple title to possess individual direct grants of rights-of-way by Congress. *See, e.g., Mo., Kan., & Tex. Ry. v. Oklahoma*, 271 U.S. 303, 309 (1926); *Western Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540 (1904); *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426, 429-30 (1880). In those cases, this Court recognized that these federally granted rights-of-way are distinct from ordinary easements because they have the "attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." *New Mexico v. U.S. Trust Co.*, 172 U.S. 183 (1898). As the

railroad industry became less profitable at the beginning of the twentieth century and settlement along rights-of-way matured into established communities, this Court in *Townsend* articulated a more appropriate vision for the property interest in FGROW: the "limited fee."

In *Townsend*, individual landowners claimed to adversely possess land that was included in the Pacific Railroad Act of 1864 but was unused by the railroad. *Townsend*, 190 U.S. at 269. This Court evaluated whether title to the FGROW was susceptible to alienation or whether it was a property interest uniquely tied to a public purpose. It determined that the railroad held the FGROW in limited fee, "made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Id.* at 271. Railroads in present possession of a transportation corridor could not alienate the land for a private purpose because "[t]he substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same for so long as it was used for the railroad right of way." *Id.*

The public interest in the FGROW was so significant, in fact, that upon possession by the railroad such land "was taken out of the category of public lands subject to pre-emption and sale." *Id.* at 269-71. Homestead patents did not convey subdivisions of the right-of-way to individuals because the Land Department "was . . . without authority to convey rights therein." *Id.* at 269.

The Court extended this "limited fee" concept to 1875 Act FGROW in *Stringham*, 239 U.S. at 47. In *Stringham*,

an 1875 FGROW was held to be "neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter." *Id.* To describe the FGROW as a limited fee protected railroad companies' use rights while respecting the dominion of the United States over the corridor.

The Court relied on a different concept, however, when confronted with challenges involving mineral rights, which did not fall within the courts' understanding of the FGROW. As the Government's brief describes in detail, *Great Northern* considered a railroad possessing an 1875 FGROW which sought to drill for oil, gas, and minerals underlying the right-of-way. The United States sued to enjoin the railroad from drilling within the corridor by characterizing the FGROW as an "easement." Brief for the United States at 8-9, *Great Northern*, 315 U.S. (No. 149), 1942 WL 542545. When this Court considered the nature of the railroad's interest in the transportation corridor, it focused on the interests attached to the natural resources embedded in the right-of-way and *not* on the interest in the right-of-way itself. The Court's conclusion that the 1875 Act grant did not entitle the railroad to drill for oil and gas turned in large part on the fact that such mineral rights were not conveyed in the original grant. *See Great Northern*, 315 U.S. at 275 ("[I]t is improbable that Congress intended [in the 1875 Act] to grant more than a right of passage, let alone mineral riches.").

Furthermore, the collateral applications of the Court's use of the term "easement" in later jurisprudence is misplaced, because under the facts of *Great Northern* the land adjacent to the right-of-way in question was

federal land.[7] The Court extended the easement concept to similarly exclude mineral rights from pre-1871 FGROW in *Union Pacific* without deciding the precise nature of the rights in question. *Union Pacific*, 353 U.S. at 119-20.

Great Northern, in other words, did not re-interpret the nature of FGROW *per se*. Rather, the decision excluded mineral rights from the federal grant without addressing the overall nature and scope of the right-of way itself. Recognition of the United States' unique federal interest in 1875 Act FGROW thus does not require overruling this Court's previous precedent in *Great Northern*.

Opinions like *Townsend* and *Stringham* recognized that these rights-of-way were no ordinary parcels of land subject to state common law. Instead, the Court described FGROW as imbued with a public purpose that trumped the private interests of railroad companies and individual landowners alike. In the later cases, *Great Northern* and *Union Pacific*, the Court reassessed the "limited fee" concept and refined its applicability to the surface transportation corridor. These later decisions ensured that railroads received no less and *no more* than what was granted by Congress. These opinions left unaddressed,

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7. The sections of FGROW at issue in *Great Northern* were located "within the exterior boundaries of the Glacier National Park." *Great N. Ry. Co. v. United States*, 315 U.S. 262, 280 n.22 (1942). Due to debate over title in the United States of the areas in question, the Court permitted the parties to stipulate that the United States retained title to lands in "limited areas" where the railroad intended to drill. *Id.* at 279-80. The Court "modified and limited" its holding "to the areas described in the stipulation." *Id.* at 280. It therefore did not resolve the issue currently before this Court.

however, the effect of Congress's ongoing oversight of FGROW via the passage of statutes such as 43 U.S.C. § 912. The Court should take this opportunity to effectuate Congress's statutory scheme for FGROW.

B. Lower courts have also recognized the United States' retained interest.

Prior to *Hash*, courts in other circuits analyzed FGROW by turning to Congress's statutory scheme, including 43 U.S.C. § 912 and 16 U.S.C. § 1248(c), and reconciling the competing demands of railroad companies, individual landowners, and the United States. These courts have by and large recognized the unique nature and scope of FGROW regardless of whether they label such rights-of-way as "easements" or "fees."

A District of Idaho case has been particularly influential in the development of this precedent. In *Idaho v. Oregon Short Line Railroad Co.*, 617 F. Supp. 207 (D. Idaho 1985), which the *amicus* brief of National Association of Reversionary Property Owners (NARPO) refers to as an "odd" case, the court held that the United States retained an interest in FGROW regardless of the date of the grant. In reaching this conclusion, the court described the nature of FGROW in a manner later invoked by other courts. The court noted that "[t]he precise nature of [the government's] retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law . . . . [43 U.S.C. § 912] evince[s] an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes, primarily for highway transportation." *Id.* at 212 *See also Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028 (10th

Cir. 1994) (quoting *Or. Short Line R.R. Co.*, 617 F. Supp. at 212); *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330 (9th Cir. 1990) (quoting *Or. Short Line R.R. Co.*, 617 F. Supp. at 212); *Whipps Land & Cattle Co. v. Level 3 Commc'ns, LLC*, 658 N.W.2d 258 (Neb. 2003) (holding that the United States retained a reversionary interest in the right of way as implied in 43 U.S.C. § 912).

Regardless of the specific date of the grants in question, these lower courts have recognized the validity of congressional statutes in managing and preserving FGROW. These courts apply the abandonment statute, 43 U.S.C. § 912, despite the fact that the statute post-dates the grant of rights-of-way because courts recognize the special nature of transportation corridors. The United States created a special estate in the form of FGROW—one in which the public is guaranteed present and future use as a transportation corridor. State common law property concepts simply fail to capture the unique nature of the rights created in these corridors. The District of Idaho identified the unique public interest in this federally created transportation corridor:

> Even if the 1875 Act granted only an easement, as opposed to a higher right-of-way interest, Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions—which were to preserve a corridor of public transportation, particularly the railroad transportation, in order to facilitate the development of the "Western vastness."

Or. Short Line R.R. Co., 617 F. Supp. at 212. This Court should similarly recognize the unique federal interest in federally granted transportation corridors and give effect to congressional statutes regulating FGROW accordingly.

III. THE TENTH CIRCUIT OPINION AT ISSUE HERE EMBODIES THE CORRECT APPROACH, IN CONTRAST TO THE FEDERAL CIRCUIT'S APPROACH IN *HASH V. UNITED STATES*.

A. The Federal Circuit Has Misconstrued the Nature and Scope of the FGROW.

The Tenth Circuit's decision in this case conflicts with the decision of the United States Court of Appeals for the Federal Circuit in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), which held that the United States did not retain any interest in 1875 Act FGROW where the adjacent lands had been conveyed without explicitly reserving the United States' interest in the land (as distinct from the right-of-way). Indeed, the distinction between the Tenth Circuit and *Hash* reflects a broader circuit split on the issue of the United States' interest in federally granted rights-of-way. *Compare Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994) *and Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330 (9th Cir. 1990) *with Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 649 F.3d 799 (7th Cir. 2011) (suggesting that the analysis in *Hash* applies to pre-Civil War FGROW). The brief for NARPO in support of Petitioners portrays *Hash* as taking the correct view, rather than as a misguided break with established precedent. *Amici* believe that the analysis of the case at bar would benefit from some additional context for the Federal Circuit's conflicting decision in *Hash v. United States*.

The *Hash* case involved a trail-wide class action brought by adjacent landowners to the Weiser River Trail in Idaho, seeking compensation from the United States for the alleged "taking" of their property when the STB issued an order authorizing the railroad to negotiate with a potential interim trail manager to "railbank" the corridor for interim trail use and future rail service, pursuant to 16 U.S.C. § 1247(d) (Trails Act). Much of the corridor was 1875 Act FGROW, and therefore the trail manager's right to acquire the corridor for interim trail use was protected by federal law, 43 U.S.C. § 912. Nonetheless, the trail manager "railbanked" the corridor under the Trails Act since part of the right-of-way was acquired by the railroad from private landowners after the lands were patented under the Homestead Act, and therefore were not acquired by the railroad pursuant to the 1875 Act.

The *Hash* decision is one of several decisions issued by the Federal Circuit following its questionable plurality decision in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), establishing a rule of *per se* liability to claimants possessing the requisite state law property interest in rail corridors that were railbanked under the Trails Act. However, the *Hash* decision was a radical expansion of the Federal Circuit's plurality decision in *Preseault*, which was premised on the determination that "[w]hen *state-defined* property rights are destroyed by the Federal Government's preemptive power [under the Federal Railbanking Law] . . . the owner of those rights is due just compensation." 100 F.3d at 1552 (emphasis added).

Unlike the Federal Circuit's decision in *Preseault* and subsequent cases, *see, e.g., Toews v. United States*,

376 F.3d 1371 (Fed. Cir. 2004), the *Hash* case concerned a railroad corridor and all attendant property rights were carved from *federal*, not state lands, whose creation, use, and disposition were controlled by federal statutes. And yet the Federal Circuit simplistically applied the analysis in cases involving rail corridors created by state law in *Preseault*, and ruled that the FGROW should be treated for all analytical purposes as if it were a purely state law easement.

Indeed, the *Hash* decision is inconsistent with this Court's decision in *Preseault v. ICC*, 494 U.S. 1 (1990), which upheld the constitutionality of the Trails Act. That decision acknowledged that the premise of any "takings" claim involving the Trails Act was its intent to "displace state law as the traditional source of the real property interests." *Id.* at 927; *see also id.* at 926 ("state law creates and defines the scope of the reversionary or other real property interests affected by the ICC's actions pursuant to [the Trails Act],") (O'Connor, J., concurring). The *Hash* court's mistaken application of its own plurality decision in *Preseault* caused the Federal Circuit to ignore the federal statutory scheme creating and governing the FGROW, and how that scheme reflected Congress's intent to preserve and protect transportation corridors.

B. The Federal Circuit's Decision in Hash Was Analytically Flawed By Its Failure to Address the Questions of Abandonment and Scope of the Right-of-Way Prior to Finding the United States to Be Liable for Compensation.

The *Hash* decision also failed to determine the scope of the FGROW or whether the corridor had been

abandoned. As the analysis invited by the Federal Circuit's plurality *Preseault* decision makes clear, "if the terms of the easement when first granted are broad enough . . . to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose." *Preseault*, 100 F.3d at 1552. Nonetheless, the *Hash* decision found a "taking" without addressing whether the *scope* of the 1875 Act right-of-way was sufficiently broad to encompass interim trail use. Significantly, the Federal Circuit itself subsequently acknowledged that the *Hash* case does *not* resolve the issue concerning the *scope* of the federal "easements" granted under the 1875 Act. *Ellamae Phillips v. United States*, 564 F.3d 1367 (Fed. Cir. 2009). Neither Petitioners nor their *amici* acknowledge the failure of *Hash* to address or resolve this potentially dispositive issue.

Additionally, the *Hash* decision never made a predicate finding of abandonment prior to issuing judgment of liability in favor of the claimants despite acknowledging that such a determination was necessary under *Preseault*. *See Hash*, 403 F.3d at 1318. That aspect of the decision contradicted *Beres v. United States*, which recognized, even where it found that the United States did not retain a "reversionary interest" in 1875 Act land, "there remain numerous issues to resolve before this court can determine if the plaintiffs are entitled to compensation, *including . . . . whether or not there was an abandonment*." 64 Fed.Cl. 403, 428 (2003) (emphasis added).

Here, as noted above, the United States plainly reserved its interest in the federally granted right-of-way itself in the patent to the adjacent landowners. Cert. Petition App. 78. Even if the conveyance of the adjacent

lands without a reservation of the United States forecloses the applicability of 16 U.S.C. § 1248(c), Section 912's requirements concerning the abandonment of the right-of-way and post-abandonment disposition of the United States' interest in any portion of the right-of-way "as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment" remain fully applicable and would lead to the opposite conclusion from the *Hash* decision.

C. This Federal Circuit Jurisprudence Is Inconsistent with Supreme Court Jurisprudence under the "Takings" Clause of the U.S. Constitution and With the Federal Circuit's Own Decisions.

The *Hash* and *Preseault* decisions are also part of a larger body of Federal Circuit jurisprudence under the Trails Act that misapplies this Court's "takings" jurisprudence. The troubling line of cases fueled by the Federal Circuit's plurality decision in *Preseault* is well illustrated by the Federal Circuit's recent decision in *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010). In *Ladd*, the Federal Circuit held that the mere issuance of a regulatory order by the STB that delayed the abandonment of the corridor for 180 days resulted in a "taking" of private property, even though the order expired without conveying any rights to use the corridor for trail purposes, and remanded the case for a determination of just compensation to the adjacent landowners. Since the corridor in the *Ladd* case was never occupied by a trail, this conclusion is in conflict with the "takings" analysis of the *Preseault* plurality decision, which was based on the rationale that the construction of a bike path pursuant to the Trails Act authorized a

"physical entry upon the private lands of the Preseaults." *Preseault*, 100 F.3d at 1551. Instead, the regulatory order merely delayed the abandonment of the corridor, which this Court has made clear does *not* constitute a regulatory taking. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

The Federal Circuit's internally inconsistent jurisprudence, as evidenced by its decisions in *Preseault*, *Hash*, and *Ladd*, has opened the door to thousands of claims for compensation by adjacent landowners under the Trails Act. According to the *National Law Journal*, the federal government has paid $49 million to property owners who filed just compensation claims against "railbanked" rail-trails this year alone, and there are 8,000 claims pending. *See* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202617646798&thepage=2&slreturn=20131111163805. Ironically, the United States' substantial payments to the adjacent landowners do not even result in the United States acquiring any property interest in these corridors. *Id.* Supreme Court review of this line of "takings" decisions involving the Trails Act would be a logical extension of the Court's examination of the FGROW.

Accordingly, a decision affirming the Tenth Circuit in this case would reverse the troubling precedent established by the *Hash* case and reduce the contradictory liability of the United States in numerous other "takings" cases under the Trails Act that are controlled by *Hash*.[8]

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8. *See Blendu v. United States*, 75 Fed. Cl. 543, 545-49 (Fed. Cl. 2007); *Ellamae Phillips Co. v. United States*, 77 Fed. Cl. 387, 393-95 (Fed. Cl. 2007); *Beres v. United States*, 64 Fed. Cl. 403 (2005); *Seger/Schneider v. United States*, CA. No. 8:99-cv-0315 (D. Neb., Jan. 15, 2008) [dkt # 294].

CONCLUSION

The federal statutes defining the acquisition, forfeiture, abandonment, and disposition of FGROW were designed to create and preserve the public investment in these transportation corridors. In updating these policies, Congress recognized that today it would be virtually impossible to recreate this system "painstakingly created over several generations" once the rights-of-way are abandoned, sold, and destroyed along with bridges, tunnels, and other costly structures due to the high cost of land and the difficulties of assembling rights-of-way in our increasingly populous nation. *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973). This long-standing national policy should be given continuing effect.

The decision of the Tenth Circuit should be affirmed.

Respectfully Submitted,

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